(9)

No. 89-189-CFH
Status: GRANTED

Title: Samuel A. Lewis, Director, Arizona Department of Corrections, et al., Petitioners
v.
Jimmie Wayne Jeffers

Docketed:
July 13, 1989

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Grant,Gerald R.

Counsel for respondent: Klein,Donald S., Liebman,James S.

Entry	Date	Note	Proceedings and Orders
1	Jul 13 1989	G	Application (A89-27) to extend the time to file a petition for a writ of certiorari from July 13, 1989 to July 20, 1989, submitted to Justice O'Connor.
3	Jul 13 1989	G	Petition for writ of certiorari filed.
2	Jul 17 1989		Application (A89-27) granted by Justice O'Connor extending the time to file until July 20, 1989.
5	Aug 8 1989		Order extending time to file brief of respondent on the merits until August 30, 1989.
6	Aug 30 1989		Brief of respondent Jimmie W. Jeffers in opposition filed.
7	Aug 30 1989	G	Motion of respondent for leave to proceed in forma pauperis filed.
8	Sep 5 1989		DISTRIBUTED. September 25, 1989
10	Sep 29 1989		REDISTRIBUTED. October 6, 1989
11	Oct 10 1989		Motion of respondent for leave to proceed in forma pauperis GRANTED.
12	Oct 10 1989		Petition GRANTED.
			**********
13	Oct 24 1989	G	Motion of respondent for appointment of counsel filed.
14	Oct 30 1989		DISTRIBUTED. NOV. 3, 1989. (MOTION FOR APPOINTMENT FOR COUNSEL).
15	Nov 6 1989		Motion for appointment of counsel GRANTED and it is ordered that James S. Liebman, Esquire, of New York, New York, is appointed to serve as counsel for the respondent in this case.
16	Nov 20 1989		Record filed.
		*	Certified copy of original record received.
19	Nov 24 1989		Brief amicus curiae of Criminal Justice Legal Foundation filed.
17	Nov 25 1989		Joint appendix filed.
18	Nov 25 1989		Brief of petitioners filed.
21	Dec 28 1989		Joint appendix filed.
22	Dec 28 1989		Brief of respondent Jimmie W. Jeffers and appendix filed.
20	Jan 5 1990		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 21, 1990. (4TH CASE)
23	Jan 17 1990		CIRCULATED.
24	Feb 2 1990		Reply brief of petitioners filed.
25	Feb 21 1990		ARGUED.

89-189

Supreme Court, U.S.
FILED
JUL 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

JAMES R. RICKETTS, Director, Arizona Department of Corrections, and DONALD WAWRZASZEK, Superintendent, Arizona State Prison,

Petitioners,

-vs-

JIMMIE WAYNE JEFFERS,

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division

*GERALD R. GRANT
Assistant Attorney General
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602)542-4686

Attorneys for PETITIONERS

*Counsel of Record

QUESTION PRESENTED

May a federal court set aside a state court's finding of an aggravating circumstance in a capital case without applying a standard that requires some deference to the state court's finding?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CASES AND AUTHORITIES	iii
OPINION BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF FACTS	4
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	23
CERTIFICATION	25
APPENDIX A	A-1
APPENDIX B	B-1

TABLE OF CASES AND AUTHORITIES

Cases	Page
Adamson v. Ricketts 865 F.2d 1011 (9th Cir. 1988)	12
Barclay v. Florida 463 U.S. 939 (1983)	11,13
Chaney v. Lewis 801 F.2d 1191 (9th Cir. 1986)	12
Godfrey v. Georgia 446 U.S. 420 (1980)	13,14
Jeffers v. Ricketts 627 F. Supp. 1334 (D. Ariz. 1986)	9
Jeffers v. Ricketts 832 F.2d 476 (9th Cir. 1987)	10,12,13
Magwood v. Smith 791 F.2d 1438 (11th Cir. 1986)	15,16
State v. Brookover 124 Ariz. 38 601 P.2d 1322 (1979)	19
State v. Ceja 126 Ariz. 35 612 P.2d 491 (1980)	20
State v. Graham 135 Ariz. 209 660 P.2d 460 (1983)	18
State v. Jeffers 135 Ariz. 404 661 P.2d 1105 (1983)	9,15,16

State v. Poland
144 Ariz. 388
698 P.2d 183 (1985) 22

State v. Smith
138 Ariz. 79
673 P.2d 17 (1983) 17

State v. Watson
120 Ariz. 441
586 P.2d 1253 (1978) 8,21

Woratzek v. Ricketts
820 F.2d 1450 (9th Cir. 1987) 16

Authorities

28 U.S.C.
§ 1254(1) 2
§ 1291 2
§§ 2253 2
§ 2241 2
§ 2254 2
§ 2254(d) 11,15,16

United States Constitution
Eighth Amendment 3
Fourteenth Amendment 3

OPINION BELOW

A three-member panel of the Ninth Circuit upheld Jeffers' convictions for first degree murder and assault with a deadly weapon and rejected his claim that he was denied an impartial sentencing tribunal. The panel also held that Arizona's "especially heinous, cruel or depraved" aggravating circumstance is not void on its face. Two members of the panel, however, concluded that the Arizona courts erroneously applied this aggravating circumstance to Jeffers' conduct and therefore set aside his death sentence. (Appendix A.)

STATEMENT OF JURISDICTION

On February 27, 1986, Jimmie Wayne Jeffers appealed the order of the United States District Court for the District of Arizona denying his application for writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction to hear the appeal pursuant to 28 U.S.C. §§ 1291 and 2253.

The Ninth Circuit filed its opinion on November 9, 1987, and denied rehearing on April 14, 1989. (Appendices A and B.) This petition is timely filed within 90 days of entry of judgment by that court. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent portion of the Eighth Amendment to the Constitution of the United States:

> [N]or cruel and unusual punishments inflicted.

The pertinent portion of the Fourteenth Amendment to the Constitution:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law . . . .

STATEMENT OF FACTS

In August of 1976, Jeffers was being held in the Pima County Jail on charges of receiving stolen property. While there, he received reports that his girlfriend, Penelope Cheney, was providing the police with information about Jeffers and certain heroin transactions. Jeffers wrote a note to another jail inmate offering him money if he would kill Cheney. The detention officer who was supposed to deliver the note seized it and read it.

Jeffers was released on bond on October 8, 1976. Shortly afterwards, he began living with Doris Van Der Veer in the Linda Vista Motel in Tucson. Jeffers had Van Der Veer deliver a note to Cheney. In the note, Jeffers asked Cheney to come back to him.

On October 20, 1976, Jeffers told Van Der Veer that Cheney was coming over and

asked her to leave during Cheney's visit. As Van Der Veer was leaving the motel room, Cheney was arriving and Jeffers introduced the two women. Jeffers and Cheney than went inside the motel room.

Van Der Veer waited around the motel grounds for about 2 hours. She then went back to the motel room and knocked on the door. Jeffers answered and told Van Der Veer to come in. Jeffers had a gun in his hand and Cheney, who appeared to be cyanotic, was lying on her back on the bed. Van Der Veer said she would leave, but Jeffers pointed the gun at her, told her to sit down and said that he needed her help. He then injected what appeared to be heroin into Cheney's hand and said, "I have given her enough shit to kill a horse and this bitch won't die."

At Jeffers' direction, Van Der Veer, a former nurse, checked Cheney's

condition. Cheney's heartbeat was faint, her breathing was labored, and a foamy fluid (a sign of a drug overdose) was coming out of her mouth. When Van Der Veer asked Jeffers if he was going to help Cheney, he responded, "No, I'm going to kill her."

Jeffers cursed at Cheney and then took her belt off. Straddling her body, Jeffers began choking her with the belt. When Cheney continued to breathe, Jeffers began choking her with his hands. Van Der Veer told Jeffers to stop because Cheney was going to die anyway, but he responded, "No, I've seen her this way before and she's come out of it." Jeffers continued choking Cheney and then told Van Der Veer to see if Cheney was dead. Van Der Veer could not find a pulse and told appellant that Cheney was dead.

Jeffers then prepared another syringe of heroin and forced Van Der Veer to inject it into Cheney's groin and hand. He also told her to get on top of Cheney and choke her. Jeffers took photographs of Van Der Veer as she complied with his orders.

Apparently still not satisfied, Jeffers again straddled Cheney and began beating her with his hands, calling her a "bitch" and a "dirty snitch." As he delivered the blows, Jeffers said, "This one is for [naming several names]." He finally dragged Cheney's body into the bathroom and put it in the shower.

After 3 days in the shower, the body began to smell. Jeffers and Van Der Veer wrapped the body in garbage bags and put it in a sleeping bag. That night they loaded the body into the trunk of Van Der Veer's car. They then drove to the Sedona area and buried Cheney's body.

The state later charged Jeffers with the first-degree murder of Cheney and with aggravated assault on Van Der Veer. On February 9, 1978, a jury found Jeffers guilty of both charges. The trial court sentenced Jeffers to death for the murder and to a prison term of not less than 5 years nor more than 10 years for the assault.

While Jeffers' appeal was pending, the Arizona Supreme Court ordered him resentenced pursuant to State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978). On July 10, 1980, the trial court found two aggravating circumstances (that Jeffers created a grave risk of death to Van Der Veer and that he committed the murder in an especially heinous, cruel and depraved manner) and again sentenced Jeffers to death. The matter then returned to the Arizona Supreme Court which affirmed the

convictions and sentences. State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105, cert. denied, 464 U.S. 865 (1983). In affirming the death sentence, the supreme court overturned the trial court's "grave risk of death" finding and its finding that the murder was "especially cruel." It affirmed the finding that the murder was "especially heinous and depraved."

Jeffers then sought federal habeas relief. On February 4, 1986, the district court denied relief. Jeffers v. Ricketts, 627 F. Supp. 1334 (D. Ariz. 1986). Jeffers appealed this decision to the Ninth Circuit. On November 9, 1987, a three-member panel of the Ninth Circuit rejected Jeffers' attacks on his convictions. Two members of the panel, however, vacated Jeffers' death sentence on the ground that the "especially heinous or depraved" aggravating

circumstance was incorrectly applied to Jeffers. Jeffers v. Ricketts, 832 F.2d 476 (9th Cir. 1987). The state moved for rehearing and suggested a rehearing en banc. The Ninth Circuit denied both requests on April 14, 1989. The state then filed this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's Decision In This Case Is Inconsistent With Federal Habeas Law, Prior Decisions By This Court, Decisions By Other Circuit Courts, And Other Decisions By The Ninth Circuit.

This case presents the question of the proper standard federal courts should apply in reviewing state court findings of aggravating circumstances in capital sentencing decisions. In general, federal habeas review of state

court convictions is limited and deferential. For example, federal courts must give state court factual findings a presumption of correctness. See 28 U.S.C. § 2254(d). With respect to findings of aggravating circumstances, a plurality of this Court has stated that its review is limited to determining whether the findings are so unprincipled or arbitrary as to somehow violate the United States Constitution. Barclay v. Florida, 463 U.S. 939, 947 (1983).

In this case, however, the Ninth Circuit did not employ a deferential review of the state court's finding that Jeffers committed this murder in an especially heinous or depraved manner. Instead, the Ninth Circuit substituted its assessment of the facts for that of the state court. This type of review is inconsistent with principles of federalism and comity.

The Ninth Circuit began its analysis by rejecting Jeffers' claim that Arizona's "especially heinous, cruel or depraved" aggravating circumstance is unconstitutionally vague on its face. Relying on an earlier decision in Chaney v. Lewis, 801 F.2d 1191 (9th Cir. 1986), cert. denied, 481 U.S. 1023 (1987), the federal court concluded that Arizona's court had narrowly construed the meaning of this circumstance so that sentencing discretion was sufficiently limited to prevent arbitrary and capricious capital sentencing decisions. Jeffers v. Ricketts, 832 F.2d at 482.[1] The court

---

1. Seven members of the Ninth Circuit's limited en banc court of 11 judges later reached the opposite conclusion. See Adamson v. Ricketts, 865 F.2d 1011, 1031-39 (9th Cir. 1988). The state's petition for writ of certiorari from the Adamson decision is presently pending before this Court.

went on to conclude, however, that this narrow definition of the aggravating circumstance could not be applied to Jeffers' case "without losing its ability to distinguish in a principled manner between those it condemns to death and those it does not." 832 F.2d at 486. While Jeffers' murder of Penelope Cheney "certainly qualifie[d]" as a "grizzly affair," the Ninth Circuit found it insufficiently "shocking" to meet Arizona's standard for especially heinous or depraved murders. 832 F.2d at 484. In doing so, the Ninth Circuit paid no deference to the state court finding. It merely substituted its judgment for that of the Arizona courts, which a federal court should not do. See Barclay v. Florida, 463 U.S. at 947.

The Ninth Circuit relied heavily on Godfrey v. Georgia, 446 U.S. 420 (1980),

in setting aside Jeffers' death sentence. The Ninth Circuit has misapplied the Godfrey decision. Godfrey's death sentence was based on a jury's finding of the "outrageously or wantonly vile" aggravating circumstance. The jury, however, received no guidance from the trial court on the meaning of the aggravating circumstance. In its appellate review of the jury's finding, the Georgia Supreme Court simply stated that the finding was "factually substantiated." As Justice Marshall pointed out in his concurring opinion, it was the failure of the Georgia courts to narrowly define and apply the aggravating circumstance that required reversal of Godfrey's sentence, not this Court's conclusion that the facts did not support the jury's finding. Godfrey v. Georgia, 446 U.S. at 435 n.1. In Jeffers' case,

the aggravating circumstance was initially found by the trial judge, who had the benefit of numerous Arizona Supreme Court decisions that narrowly interpreted the meaning of the circumstance. On appeal, the Arizona Supreme Court carefully reviewed the trial judge's finding and even invalidated a portion of it. State v. Jeffers, 135 Ariz. at 429-30, 661 P.2d at 1130-31. Under these circumstances, Godfrey does not authorize the type of review that the Ninth Circuit employed here.

There is conflict within the circuits over the proper standard of review for state court findings of aggravating circumstances. The Eleventh Circuit has suggested that these findings are entitled to a presumption of correctness under 28 U.S.C. § 2254(d). Magwood v.

Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). In a decision preceding Jeffers, the Ninth Circuit relied on 28 U.S.C. § 2254(d) in upholding an aggravating circumstance. Woratzek v. Ricketts, 820 F.2d 1450, 1459 (9th Cir. 1987). In Jeffers, however, the Ninth Circuit seems to apply a de novo review of the aggravating circumstance, paying no deference to the state court finding.

This Court should accept certiorari to set a standard for federal courts to apply in reviewing state court findings of aggravating circumstances. The issue is an important one and the conflict in the circuits should be resolved.

II.

The Ninth Circuit Incorrectly Applied Arizona Law.

In concluding that the "especially heinous or depraved" circumstance could

not be applied to Jeffers' conduct, the Ninth Circuit reviewed a number of Arizona cases that discussed this circumstance. According to the Ninth Circuit, these cases demonstrate that Jeffers' conduct was not especially heinous or depraved. A review of the cases, however, establishes just the opposite:

1. State v. Smith, 138 Ariz. 79, 673 P.2d 17 (1983).

The only evidence that Smith murdered in an especially heinous or depraved manner was the uncorroborated testimony of his accomplice that, after the victim's body had been buried, Smith had requested the playing of a tape of the song, "We Are the Champions." Evidence also showed that Smith later attempted suicide, partly out of remorse over the murder. The Arizona Supreme Court

concluded that this evidence did not establish beyond a reasonable doubt that Smith had a heinous and depraved attitude.

In contrast, the evidence establishing Jeffers' heinous and depraved attitude dealt with his conduct during or immediately after the killing. The evidence also did not come from an accomplice, as did the evidence in Smith. Doris Van Der Veer was the victim of the assault with a deadly weapon charge in this case, and Jeffers forced her to become involved in Cheney's murder. Finally, Jeffers, unlike Smith, expressed no remorse over the murder.

2. State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983).

Graham, who suffered from organic brain damage and was extremely immature and easily influenced by others, killed a man by shooting him twice. After the

murder, Graham smiled while telling friends that the victim "squealed like a rabbit" when he was shot. The Arizona Supreme Court concluded that Graham's statement about the killing was more likely attributable to his immaturity, nervousness and need to impress his peers than to a hardened attitude towards the death of another.

Jeffers was not immature or easily influenced by others and did not suffer from organic brain damage. His comments were made while straddling and repeatedly striking his dying victim. His words and conduct, unlike Graham's, showed an especially heinous or depraved state of mind.

3. State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979).

Brookover, as part of a drug ripoff, shot his victim in the back. As the

victim lay on the floor moaning, Brookover said, "Don't worry * * * it will be over soon" and shot him again in the back. The Arizona Supreme Court concluded that the murder was not especially heinous or depraved.

Penelope Cheney, unlike Brookover's victim, did not suffer a relatively quick death. Jeffers, unlike Brookover, climbed atop his victim and debased her by striking and cursing her. Jeffers killed his victim because she had "snitched" on him and his words and conduct show that he relished the killing.

4. State v. Ceja, 126 Ariz. 35, 612 P.2d 491 (1980).

Ceja murdered two people in order to steal a large amount of marijuana from them. He shot the first victim seven times, four times in the head at close range. He shot the second victim four

times, twice at extremely close range, and then kicked him in the face. The Arizona Supreme Court concluded that the murders were especially heinous and depraved.

If anything, Jeffers' conduct was more reprehensible than Ceja's. Jeffers overdosed his victim with heroin, strangled her with a belt and with his hands, and then climbed on top of her to beat and curse her. Jeffers was certainly as determined to kill as Ceja, and surpassed Ceja in personally debasing his victim.

5. State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978).

Watson and Reid burglarized a home. While Watson was upstairs, the homeowner began shooting at Reid. Watson came back downstairs and shot the victim in the back four times, the last time while the

victim was face down on the floor. The Arizona Supreme Court concluded that this killing was not especially heinous or depraved.

Penelope Cheney, unlike Watson's victim, did not initiate violence that led to her death. Watson, unlike Jeffers, did not debase his victim by striking and cursing him. Watson, unlike Jeffers, had no firm intent to kill anyone and used deadly force only after the victim did.

6. State v. Poland, 144 Ariz. 388, 698 P.2d 183 (1985).

The Poland brothers were convicted of the murder of two armored car guards. There was no direct evidence regarding the circumstances surrounding the deaths. It was this lack of evidence that led the Arizona Supreme Court to conclude that the state had failed to

prove that the murders were heinous or depraved.

There is no lack of evidence regarding the circumstances of Penelope Cheney's death and Jeffers' role in it. His words and actions plainly establish the heinousness and depravity of this murder.

Thus, even under the standard of review the Ninth Circuit employed here, the decision to set aside Jeffers' death sentence is erroneous. The Ninth Circuit reached its result through a misinterpretation of Arizona case law.

CONCLUSION

This case merits this Court's attention. Without a standard for federal court review of state court findings of aggravating circumstances, conflicts between the circuits will continue. The Ninth Circuit set aside Jeffers' death sentence based upon

misinterpretations of the decisions of this Court and of the Arizona courts. Petitioners therefore respectfully ask this Court to grant review.

DATED this 13th day of July, 1989.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division

Gerald R. Grant

GERALD R. GRANT
Assistant Attorney General
(Counsel of Record)

Attorneys for PETITIONERS

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

GERALD R. GRANT, a member of the Bar of this Court, being duly sworn upon oath, deposes and says:

That he served three copies of the Petition for Writ of Certiorari upon Donald S. Klein and Frank P. Leto, Pima County Public Defender's Office, 32 North Stone Avenue, Tucson, Arizona, 85701, Attorneys for Jimmie Wayne Jeffers, by depositing the same in the United States Mail, with first class postage prepaid, return receipt requested.

Additionally, as a courtesy, he herewith certifies that service of three copies of this petition has been made upon the United States of America by deposing the same in the United States Mail, with first class postage prepaid,

addressed to the Solicitor General, Department of Justice, Washington, D.C., 20530.

DATED this 13th day of July, 1989.

Gerald R. Grant

GERALD R. GRANT
Assistant Attorney General
Criminal Division
Department of Law
1275 West Washington
Phoenix, Arizona 85007
Telephone: (602)542-4686

SUBSCRIBED AND SWORN to before me this 13th day of July, 1989.

Janet E. Dyer

JANET E. DYER
NOTARY PUBLIC

My Commission Expires:

December 10, 1989

0124D jd

APPENDICES

APPENDIX A

[Filed November 9, 1987]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JIMMIE WAYNE JEFFERS, Petitioner-Appellant, -vs- JAMES R. RICKETTS, Director, Arizona Department of Corrections; DONALD WAWRZASZEK, Superintendent, Arizona State Prison, Respondents-Appellees.	)	CA No. 86-1840 DC No. CV-85-945-ACM O P I N I O N

Appeal from the United States District Court for the District of Arizona
Alfredo C. Marquez,
District Judge, Presiding
Argued and Submitted February 13, 1987 - San Francisco, CA

Filed : _____

BEFORE: PREGERSON AND CANBY, CIRCUIT JUDGES AND WILSON*
District Judge

---

* The Honorable Stephen V. Wilson, United States District Judge for the Central District of California, sitting by designation.

CANBY, CIRCUIT JUDGE:

Jimmie Wayne Jeffers appeals the dismissal of his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Jeffers' habeas petition challenges his convictions for assault with a deadly weapon and first degree murder and his sentence of death. We affirm in part, reverse in part, and remand for proceedings consistent with our opinion.

FACTS AND PROCEDURAL HISTORY

Jeffers' was convicted of murdering Penelope Cheney and of assaulting Doris Van der Veer with a deadly weapon. Penelope Cheney had been Jeffers' girlfriend and had been arrested with Jeffers in May of 1976 on state charges of receiving stolen property. Jeffers had posted bail for Cheney, but had been unable to post bond for himself and remained in custody at the Pima County

Jail. While in jail Jeffers received reports that Cheney had been cooperating with the police, providing information to them about Jeffers and certain heroin transactions. Jeffers wrote a note to another jail inmate offering him money if he would kill Cheney. The detention officer who was supposed to deliver the note read it and seized it. Jeffers was finally released on bail in early October.

Later that same month, Jeffers was living with Doris Van der Veer in the Linda Vista Motel in Tucson, Arizona. Jeffers sent a note to Cheney requesting that she meet with Jeffers. On October 20th Jeffers told Van der Veer that Cheney was coming over and asked her to leave while Cheney was there. Cheney arrived at the motel room when Jeffers and Van der Veer were there. The two women met briefly and Van der Veer then went outside, leaving Jeffers and Cheney

in the room. Approximately two hours later Van der Veer returned to the motel room and knocked on the door. Jeffers opened the door. Jeffers had a gun in his hand; Cheney was lying on the bed and appeared to be cyanotic. While Van der Veer watched, Jeffers injected a liquid into Cheney's hand and said, "I have given her enough shit to kill a horse and this bitch won't die." Jeffers told Van der Veer, a former licensed practical nurse, to check Cheney. Cheney's heartbeat was faint, her breathing was labored, and a foamy fluid was coming out of her mouth. Van der Veer asked if appellant was going to help Cheney. He responded, "No, I'm going to kill her." Jeffers straddled Cheney's body and began choking her, first with his belt and then with his hands. After it appeared that she had died, Jeffers prepared another syringe and forced Van der Veer to inject

heroin into Cheney's groin and hand. He also told Van der Veer to get on top of Cheney and choke her. He took photographs of both of these acts. Jeffers then got on top of Cheney and began beating her with his hands. As he did this, he called her a "bitch" and a "dirty snitch" and said, "This one is for [naming several names]." Jeffers finally dragged Cheney's body into the bathroom and put it in the shower.

The body remained in the shower for three days. When the body began to smell, Jeffers and Van der Veer wrapped it in garbage bags and put it in a sleeping bag. That night they put the body in the trunk of Van Der Veer's car. Jeffers and Van der Veer took Cheney's body to a place near Sedona, Arizona, and buried it in a shallow grave.

On February 9, 1978, a jury found Jeffers guilty of first-degree murder and

assault with a deadly weapon. The trial judge sentenced Jeffers to death on the first degree murder conviction. He also sentenced Jeffers to not less than 5 nor more than 10 years in prison on the assault conviction. Jeffers appealed from the judgments and the sentences imposed.

As a result of the appeal, Jeffers was resentenced on the murder conviction. On July 10, 1980, the trial court found two aggravating circumstances and no mitigating circumstances, and again imposed the death penalty. The Arizona Supreme Court affirmed both the convictions and the sentences. State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105 (1983). The sole aggravating circumstance upheld by the Arizona Supreme Court was that Jeffers had committed the murder "in an especially heinous. . . or depraved manner." Ariz.

Rev. Stat. Ann. §13-703(F)(6). The Supreme Court of the United States denied certiorari. Jeffers v. Arizona, 464 U.S. 865 (1983).

On December 2, 1983, Jeffers filed a petition for writ of habeas corpus in the district court. He subsequently filed an amended petition and requested an evidentiary hearing. On Feb. 4, 1986, the district court denied Jeffers' motion for evidentiary hearing and dismissed his petition. Jeffers v. Ricketts, 627 F. Supp. 1334 (D. Ariz. 1986). Jeffers appealed to this court on Feb. 27, 1986.

DISCUSSION

A. Issues

Jeffers raises some 13 questions for our consideration. Because we find that Jeffers was unconstitutionally sentenced to death, we need not reach some of the issues he presents. The questions we address are:

1. Did the prosecutor's refusal to grant immunity to a defense witness, while granting immunity to four state witnesses, violate Jeffers' sixth amendment right to compulsory process, thereby denying due process?

2. Did certain evidentiary rulings at his trial deprive Jeffers of due process?

3. Did the introduction of evidence of other "bad acts" deny Jeffers a fair trial?

4. Was Jeffers denied due process of law when he made a single appearance before the jury in jail clothing?

5. Was Jeffers denied an impartial sentencing tribunal?

6. Was Arizona's standard of aggravation for murder committed in an "especially heinous ... or depraved manner" constitutionally applied to Jeffers?

B. Matters Concerning the Trial

1. Refusal to grant immunity to defense witness

Jeffers contends that refusal to grant immunity to a defense witness, when the state had previously offered and granted immunity to four state witnesses, violated Jeffers' sixth amendment right to compulsory process and denied him due process of law. The state granted immunity to Doris Van Der Veer, Ramona Eppling, Sharon Galarza, and Rich Honton. The state refused to grant immunity to Louis Rosso, who was called to the stand to help Jeffers establish his alibi defense.

Denial of immunity for a defense witness can violate due process. United States v. Lord, 711 F.2d 887 (9th Cir. 1983). The defendant is entitled to an evidentiary hearing if he makes "an unrebutted prima facie showing of

prosecutorial misconduct that could have prevented a defense witness from giving relevant testimony." Id. at 891. In order to make a prima facie showing of prosecutorial misconduct, a defendant has the burden of showing, first, that the evidence was relevant and, second, that the prosecution deliberately intended to distort the judicial factfinding process by denying immunity to the defense witness. Id. (citing with approval Government of Virgin Islands v. Smith, 615 F.2d 964, 968 (3d Cir. 1980)). Jeffers has not met his burden.

Jeffers testified that on the day that Cheney died, he was out making a heroin purchase. Earler in that week Van der Veer and Jeffers had made a purchase from Louis Rosso. Van der Veer testified that on that occasion Rosso had sold Jeffers enough heroin to satisfy Jeffers' needs for several days. Her testimony

therefore made Jeffers' alibi that he was out buying heroin somewhat less credible. According to Jeffers, Rosso would have testified that he had only sold Jeffers a small quantity of heroin. Although neither clearly exculpatory nor essential to the defense, Rosso's testimony would have been relevant, satisfying one element of the Lord test.

There is, however, no evidence whatsoever of prosecutorial misconduct. The defense did not make known until the middle of the trial that it intended to call Rosso. There is no suggestion that the prosecutor made any threat to Rosso that induced him to invoke the fifth amendment, as was prima facie shown to have occurred in Lord, 711 F.2d at 891. Nor is there any showing that the prosecution presented a distorted factual picture by immunizing its witnesses to testify to one side of a story while

denying immunity to defense witnesses who would present the other side. See United States v. Alessio, 528 F.2d 1079, 1080-82 (9th Cir.), cert. denied, 426 U.S. 948 (1976); United States v. Paris, 812 F.2d 471, 477 (9th Cir. 1987). Jeffers' challenge therefore fails the second prong of the Lord test. See United States v. Disla, 805 F.2d 1340, 1353 (9th Cir. 1986). He has made no prima facie showing that the decision not to grant immunity to Rosso denied him a fair trial. We affirm the district court's decision on this issue.

2. Evidentiary rulings

Jeffers contends that evidentiary rulings in capital cases must meet a standard of "extra reliability." He draws support from the plurality opinion in Ford v. Wainwright, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), which stated that "[i]n capital proceedings generally, this

Court has demanded that factfinding procedures aspire to a heightened standard of reliability." Id. at 2603, 91 L.Ed.2d at 347. Insofar as Jeffers' argument suggests that evidentiary rulings and their review are subject to a totally different methodology in capital cases from that in all other criminal cases, we do not accept it. We readily agree, however, that we must review capital cases with heightened concern for the reliability of the state court's procedures, see Spaziano v. Florida, 468 U.S. 447, 456 (1984), because "the penalty of death is qualitatively different from a sentence of imprisonment, however long." Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion of Stewart, J.). Even by that standard, however, we find that none of the challenged state court

evidentiary rulings amount to constitutional error.

a. Exclusion of Myron McRoberts' Testimony

In order to show that only Van Der Veer, and not Jeffers, was with Cheney at the time of her drug overdose and death, the defense called Myron McRoberts, a guest at the motel. He testified that he saw Van Der Veer and a blonde woman (presumably Cheney) leave the motel together on the day in question. Among the reasons offered by McRoberts why he remembered the events on the day of Cheney's death, more than 14 months prior to his testimony, was that he was told "there [was] a cute blonde in room 7." The trial court excluded that statement, and Jeffers contends that the court erred. The Arizona Supreme Court held that the evidence was improperly excluded as hearsay, but that the error was

harmless. We find no constitutional error. The evidence was cumulative of other testimony offered by McRoberts. Its exclusion will not support the granting of habeas corpus relief.

b. Prior "bad acts" involving Cheney

Jeffers also contends that the trial court committed constitutional error when it admitted statements of Cheney through the testimony of Edith Meck, the manager of the apartment complex where Jeffers was living at the time, and of Nurse Ramirez, a nurse at Tucson Medical Center where Cheney went to be treated in November of 1975. Meck testified that Cheney said that Jeffers had drugged her and had thrown her through the bedroom window. Ramirez testified that Cheney said that her boyfriend had drugged her and that she had jumped through the bedroom window because she feared further violence from Jeffers. The Arizona

Supreme Court held that the statement made to Meck was properly admitted under the excited utterance exception to the hearsay rule. It held that most of the statement made to Ramirez was properly admitted under the medical treatment exception. The comment that her boyfriend had drugged her was held improperly admitted, but harmless, because it was cumulative of the properly admitted statements made to Meck.

The inability to cross-examine the declarant Cheney did not deprive Jeffers of a fundamentally fair trial. See Barker v. Morris, 761 F.2d 1396 (9th Cir. 1985), cert. denied, 106 S.Ct. 814 (1986). The confrontation clause permits the introduction of out-of-court statements if they are both necessary and reliable. Barker, 761 F.2d at 1399. The statement was sufficiently reliable as an excited utterance. See, e.g. State v.

Peeler, 126 Ariz. 254, 614 P.2d 335 (Ariz App. 1980). Moreover, Cheney's statements were partially corroborated by independent evidence.

Cheney's statements were also necessary. At trial Jeffers contended that he loved Cheney and that he would be unable to hurt her. The challenged testimony was necessary to rebut this contention. We conclude that the admission of Cheney's statements to Meck and Ramirez did not deprive Jeffers of a fair trial.

3. Other "bad acts" testimony

Jeffers contends that the admission of evidence of other "bad acts" denied him a fair trial. The evidence of prior bad acts was elicited through the testimony of the immunized witness Sharon Galarza. Galarza testified that Jeffers had committed other acts of violence, including assaults with drugs, knives and

guns, upon Galarza, Cheney, and others. For Galarza's willingness to testify for the prosecution, the state dropped drug and prostitution charges against her. Her testimony is reported in State v. Jeffers, 135 Ariz. at 416-17, 661 P.2d at 1117-18.

Rule 404(b) of the Arizona Rules of Evidence, like the federal rule, forbids admission of evidence of a defendant's prior crimes, wrongs, or acts "to prove the character of a person in order to show that he acted in conformity therewith." The trial court instructed the jury that it could consider the evidence of bad acts to show a common scheme or plan, identity, or other similar purposes. On appeal, the Arizona Supreme Court held that the evidence of bad acts was admissible, not to show a common plan or identity, but as an explanation why the murder was not

reported sooner by those who were threatened.

Jeffers argues that the evidence ought not to have been admitted, but he offers no reason why the Arizona Supreme Court's ruling was erroneous. Our review of the record discloses no ground for concluding that the admission of the evidence denied Jeffers a fair trial. See Colley v. Sumner, 784 F.2d 984, 990 (9th Cir.), cert. denied, 107 S.Ct. 142 (1986). Jeffers' real complaint is that the evidence was admitted under one theory by the trial court, and the jury was so instructed, while the Arizona Supreme Court held the evidence admissible on a different theory.

An erroneous instruction by itself justifies habeas relief only if it "so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S.

141, 147 (1973). The trial court's instruction had no such effect. Nor did it lead to the evil that Rule 404(b) is intended to prevent. Under the trial court's instructions, the jury was not permitted to consider the evidence of bad acts to prove Jeffers' character in order to show that he acted in conformity with that character. The district court did not err in denying habeas relief.

4. Appearance before the jury in jail clothing

Jeffers contends that his trial was rendered unfair by his involuntary appearance before the jury in readily identifiable jail clothing. The facts surrounding the issue are not in dispute. On one occasion Jeffers appeared before the jury in his jail clothing after telling his jailor that he didn't want to wear his civilian clothing to court. In order to prevail on this

issue, Jeffers must establish that the appearance in jail clothing was involuntary, Bentley v. Crist, 469 F.2d 854, 856 (9th Cir. 1972); that a juror would recognize the clothing as issued by a jail, United States v. Rogers, 769 F.2d 1418, 1422 (9th Cir. 1985); and that the error was not harmless. Jeffers cannot meet his burden. The choice of apparel was his, the clothing was not readily identifiable, and the jury already knew that Jeffers had been incarcerated. During voir dire the jurors were informed of Jeffers' efforts to escape from the Pima County Jail. We affirm the district court's denial of habeas relief on this ground.

B. Sentencing Matters

1. Denial of an impartial sentencing tribunal

Jeffers contends that his constitutional rights were violated when

he was resentenced by Judge Birdsall, the judge who had originally sentenced him. After the initial sentencing, Judge Birdsall became the recipient of a "mail order blitz." The Judge filed a complaint with the postal authorities and Jeffers' name was provided to investigators as the likely source of the unwanted mailings. Jeffers admitted to his part in the mailings; the mail blitz ceased; and no charges were brought against Jeffers. At his later resentencing, Jeffers filed a motion for a new judge. An evidentiary hearing was held before a different judge and his motion was denied. The Arizona Supreme Court upheld the lower court's findings that Jeffers had failed to establish bias. It also observed that bias caused by a defendant's voluntary conduct ought not to be ground for disqualification.

The district court found that Jeffers had received a full and fair evidentiary hearing in state court and that there was, therefore, no need for an evidentiary hearing in federal court. After reviewing the evidence, the district court found that Judge Birdsall's conduct fell short of any constitutional bias. We agree. We reject Jeffers' contention that there was an appearance of impropriety that required the district court to hold an evidentiary hearing. Jeffers was not treated unfairly in the circumstances he brought into being. The district court did not err in its ruling.

2. Application of the "especially heinous, cruel or depraved" aggravating circumstance

Jeffers contends that Arizona's statute prescribing the death penalty when the murder was committed in an "especially

heinous, cruel, or depraved manner" is unconstitutionally vague on its face and as applied. See Ariz. Rev. Stat. Ann. § 13-703(F)(6)(1982). His argument that the statute is void on its face is foreclosed by our decision in Chaney v. Lewis, 801 F.2d 1191, 1194-96 (9th Cir. 1986), cert. denied, 107 S.Ct. 1911 (1987). There, we rejected a similar challenge to the same statute, pointing out that "[a]lthough the statutory language is broad, as any murder could be considered cruel, heinous, or depraved, the Arizona Supreme Court need not construe the statute open-endedly." Id. at 1195. In so stating, we were echoing the plurality opinion in Gregg v. Georgia, 428 U.S. 153, 201 (1976), where the Court upheld a Georgia statute providing a death penalty if a murder was "'outrageously or wantonly vile, horrible or inhuman in that it involved torture,

depravity of mind, or an aggravated battery to the victim.'" Id. (quoting Ga. Code Ann. § 27-2534.1(b)(7); see also Proffitt v. Florida, 428 U.S. 242, 255-56 (1976) (plurality opinion).

In Chaney, we also stated that "[t]he Arizona Supreme Court appears to have sufficiently channeled sentencing discretion to prevent arbitrary and capricious capital sentencing decisions." Chaney, 801 F.2d at 1195.[1] Finally, we held that the death

---

[1] In Tison v. Arizona, 55 U.S.L.W. 4496 (U.S. April 21, 1987), petitioners argued that Arizona had given an unconstitutionally broad construction to its aggravating factors in § 13-703. The Supreme Court held that the issue was not within the grant of certiorari, and expressed no opinion on it. Id. at 4499 n.2.

The Tenth Circuit has recently held, en banc, that Oklahoma had failed to give an adequate narrowing construction to its aggravating factor of murder that is "especially heinous, atrocious, or cruel." Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987) (en banc).

sentence imposed upon Chaney was consistent with the Arizona law as established by the Arizona Supreme Court: the murder was cruel because the victim suffered greatly, and was depraved because Chaney's helpless victim (a sheriff's deputy) was shot in the back when Chaney could have made his escape without again shooting the victim. Id.

While Chaney establishes that the Arizona statute is not void on its face and is capable of constitutional application, it naturally does not answer the question whether the Arizona statute was constitutionally applied to Jeffers in this case. In any individual application, the statute must not be so broadly construed that "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, 446 U.S. 420,

433 (1980) (plurality opinion). After reviewing the Arizona Supreme Court cases defining "especially heinous . . . or depraved," we conclude that Jeffers' death sentence violated the Eighth and Fourteenth Amendment. See id. at 423.

"Heinous" and "depraved" are inherently more difficult terms to define than is "cruel."[2] The Arizona Supreme Court

---

[2] This difficulty of definition is of major importance because Arizona, unlike some other states using similar standards, applies "heinous, cruel, or depraved" disjunctively. State v. Richmond, 136 Ariz. 312, 319, 666 P.2d 57, 64, cert. denied, 464 U.S. 986 (1983); see Cartwright v. Maynard, 822 F.2d 1477 (9th Cir. 1987) (en banc) (disjunctive application of "especially heinous, atrocious, or cruel" struck down for lack of adequate narrowing construction); Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases -- The Standardless Standard, 64 No. Car. L. Rev. 941, 980-82 (1986). Problems of definition are considerably reduced under the Arizona standard when the facts of a case suggest both cruelty and depravity. See, e.g., Chaney, 801 F.2d at 1195; Woratzek v. Ricketts, No. 85-2367, slip op. at 17018 (9th Cir. June 25, 1987) (amended opinion).

has defined cruelty to include the infliction of physical and mental pain on the victim. State v. Gretzler, 135 Ariz. 42, 51, 659 P.2d 1, 10, cert. denied, 461 U.S. 971 (1983). Especially cruel murders involve the senseless or sadistic infliction of great pain. State v. Lujan, 124 Ariz. 365, 372, 604 P.2d 629, 636 (1979). In order to establish that a murder is especially cruel, the court must find beyond a reasonable doubt that the victim was conscious and able to suffer physical pain and mental anguish. Id. The Arizona Supreme Court held that such evidence was lacking in Jeffers' case. State v. Jeffers, 135 Ariz. 404, 429, 661 P.2d 1105, 1130 (1983). Jeffers' death sentence accordingly rests on the application of the more elusive standard of murder committed in an "especially heinous . . . or depraved manner."

The Supreme Court of Arizona has adopted dictionary definitions of "heinous" as "hatefully or shockingly evil; grossly bad" and of "depraved" as "marked by debasement, corruption, perversion or deterioration." State v. Knapp, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977), cert. denied, 435 U.S. 908 (1978). Both terms "go to the mental state and attitude of the perpetrator as reflected in his words and actions." State v. Gretzler, 135 Ariz. at 51, 659 P.2d at 10. In Gretzler, the Arizona Supreme Court set forth factors which lead to a finding of heinousness or depravity, with examples of all but one. They were:

(1) a relishing of the murder by the killer. See State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067 (1980) (defendant murdered four people

and "kept a spent bullet as a grisly souvenir of his crime"); State v. Bishop, 127 Ariz. 531, 622 P.2d 478 (1980) (defendant killed victim by repeated blows with hammer, tied him up, caused him to fall down mine shaft, threw rocks on victim as he lay twitching, drove away saying "Good-by Norman. I hope we never see you again").

(2) gratuitous violence against the victim. See State v. Ceja, 126 Ariz. 35, 612 P.2d 491 (1980) (defendant shot female victim twice, dragged her into another room and shot her four more times in head for no apparent reason; shot male victim three times and, after he had fallen, shot him once more in back and then kicked him

repeatedly when victim was unconscious or dead).

(3) needless mutilation of the victim. See State v. Vickers, 129 Ariz. 506, 633 P.2d 315 (1981) (defendant strangled cellmate, then carved words "Bonzai" into victim's back); State v. J.C. Smith,[3] 131 Ariz. 29, 638 P.2d 696 (1981) (defendant mutilated female murder victims' breasts and genitalia).

(4) senselessness of the crime. See State v. Tison, 129 Ariz. 526, 633 P.2d 335 (1981), cert. denied, 459 U.S. 982 (1982) (unnecessary murder of victims, including two-year-old child, in no position to thwart murderer's

---

[3] Because there are several Arizona death penalty cases entitled State v. Smith, we have added initials to the Smith surnames.

escape); State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1981), cert. denied, 459 U.S. 882 (1982) (defendant stabbed woman to death and then indiscriminately attacked her children, attempting to stab and burn them to death).

(5) helplessness of the victim. Gretzler, 135 Ariz. at 52-53, 659 P.2d at 11-12. The last two factors, senselessness of the crime and helplessness of the victim, need not always lead to a finding that a murder is heinous or depraved, however. Id. at 53, 659 P.2d at 12; See also State v. B. Smith, 146 Ariz. 491, 503, 707 P.2d 289, 301 (1985).

Illumined as the above standard is by the case examples furnished by the Arizona Supreme Court, it seems to call for conduct or attitudes more shocking than those exhibited by Jeffers. We do

not minimize Jeffers' conduct; murder is a grisly affair and this one certainly qualifies. Nevertheless, the Arizona Court on more than one occasion has emphasized that, "because most first degree murders are cruel, heinous and depraved the statutorily required inquiry with respect to imposition of the death penalty is whether the conduct was especially cruel, heinous or depraved." State v. Johnson, 147 Ariz. 395, 401, 710 P.2d 1050, 1056 (1985); See State v. B. Smith, 146 Ariz. at 503, 707 P.2d at 301; State v. Lujan, 124 Ariz. 365, 372, 604 P.2d 629, 636 (1979). That Jeffers' crime cannot meet this rigorous standard becomes even more apparent when his case is compared with those in which the Supreme Court of Arizona found that one or more of the components of heinousness and depravity had not been shown.

The Supreme Court of Arizona held that Jeffers had "relished" his crime:

> [W]hile Jeffers was beating the [dead] victim he called her "a bitch and a dirty snitch" and with each striking blow said, "This one is for so and so. [naming several names]. This evidences the relish with which appellant committed the murder. ...[W]e find that the remarks made by appellant, while at the same time beating his victim, establish that the offense was committed in an especially heinous and depraved manner.[4]

Jeffers, 135 Ariz. at 430, 661 P.2d at 1131. Yet in State v. R.D. Smith, 138

---

[4] The facts regarding Jeffers' conduct are drawn entirely from the testimony of Van der Veer, who testified under a grant of immunity. See State v. R.D. Smith, 138 Ariz. 79, 87, 673 P.2d 7, 15 (1983) (Feldman, J., concurring and dissenting)

Ariz. 79, 673 P.2d 17 (1983), the Arizona Supreme Court held that a defendant had not been shown to have exhibited a heinous and depraved attitude when he repeatedly raped the murder victim and had requested the playing of a tape "We are the Champions."[5] Id. at 86, 673 P.2d at 24. And in State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983), a defendant who shot his victim was not shown to have demonstrated a heinous or depraved attitude when he smiled and told

---

(questioning death penalty imposed on strength of testimony of accomplice testifying under immunity), cert. denied, 465 U.S. 1074 (1984).

[5] The murder was found to have been especially cruel however, and the death sentence was accordingly affirmed. Id. R.D. Smith, 138 Ariz. at 85, 673 P.2d at 23.

his companion that the victim had "squealed like a rabbit" when shot. See also State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979) (murder not committed in heinous or depraved manner when a defendant shot victim once in back, told groaning victim "Don't worry * * * it will be over soon" and shot him again, placed victim's body in victim's van and abandoned van at airport).

Of all of the components of heinousness and depravity set forth by the Arizona Supreme Court in Gretzler, none is more subjective than the relishing of the crime by the defendant. When remarks made by the defendant at the time of the crime are used to establish especial heinousness and depravity, the distinction between ordinary and especial depravity must be clear in order to avoid arbitrary application of the standard. We conclude that the line is not clear in this case, and that Jeffers'

remarks provide "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (plurality opinion).[6]

The other factor that the Arizona Supreme Court relied upon to support a finding of heinousness or depravity was the infliction of gratuitous violence upon the victim after death. Jeffers climbed on top of the dead victim and hit her several times in the face, while making the remarks referred to above. Here again, the level of objectionable

---

[6] In rejecting Jeffers' petition, the district court referred to the fact that Jeffers had forced Van der Veer to choke the dead victim while he took pictures. This fact was not relied upon as evidence of depravity by either the sentencing court or the Arizona Supreme Court. Van der Veer testified that Jeffers told her the reason he was taking the pictures was to have proof that Van der Veer had been an accomplice.

conduct was far below that in the case the Court principally relied on, State v. Ceja, 126 Ariz. 35, 612 P.2d 491 (1980), and was wholly unaccompanied by mutilation in any meaningful sense of that term. We are unable to find a principled means of distinguishing the depravity of Jeffers' conduct from that in State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1979) (robber in shootout shoots victim in back four times, the last time while victim is face down on floor; held not heinous or depraved), or State v. Poland, 144 Ariz. 388, 698 P.2d 183 (1985), aff'd, 106 S.Ct. 1749 (1986) (evidence that victims, who may have been unconscious, were placed in weighted sacks and submerged in lake not sufficient to show heinousness or depravity). Nor, at the level of violence displayed by Jeffers, are we

able to attach controlling significance to the fact that the victim had passed from unconsciousness to death by the time Jeffers inflicted the blows.[7] He displayed no state of mind that signifies a level of depravity greater than those found not to meet the definition of "especially heinous . . . or depraved" in the cases last cited.[8]

---

[7] It is not clear that the Arizona Supreme Court placed importance on the fact that the victim was dead rather than unconscious at the time of the blows. In discussing the much greater level of gratuitous violence in State v. Ceja, the Court referred to repeated violence "although the-victim was already unconscious or dead." Jeffers, 135 Ariz. at 430, 661 P.2d at 1131 (emphasis added). But see State v. Richmond, 136 Ariz. 312, 666 P.2d 57, cert. denied, 464 U.S. 986 (1983), in which a majority of the Court (two concurring and one dissenting Justices) held the view that twice driving over a victim would not demonstrate depravity if the perpetrator had no way of knowing that the first run was sufficient to kill. Id. at 323, 324, 666 P.2d at 68, 69.

[8] The Arizona Supreme Court found it unnecessary to rule on whether Jeffers' disposing of the body in a shallow grave

Because we conclude that the standard of heinousness and depravity delineated in prior Arizona cases cannot be applied in a principled manner to Jeffers, his death sentence must be struck down as arbitrary. See Godfrey, 446 U.S. 432-33. In so ruling, we are mindful of the recent decision of the United States Supreme Court in McCleskey v. Kemp, 107 S.Ct. 1756 (1987). There the Court stated that "absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation by demonstrating

---

three days after the murder constituted further evidence of depravity. We fail to see how this action of Jeffers can be differentiated from placing a victim alive in a weighted sack and sinking the sack into a lake, see Poland, 144 Ariz. 389, 698 P.2d 183 (1985), aff'd, 106 S.Ct. 1749 (1986), or abandoning the victim's body in the victim's own van, see Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979), both of which were held not to demonstrate depravity.

that other defendants who may be similarly situated did not receive the death penalty." Id. at 1774. In further explanation, the Court quoted Gregg v. Georgia, 428 U.S. at 199, to the effect that "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." Id.

Our ruling is not contrary to these principles. No acts of prosecutorial discretion or judicial clemency are involved in our comparisons. The Arizona cases upon which we rely are those establishing the minimum requirements for the aggravating factor of especial heinousness or depravity. While the Arizona Supreme Court is entitled to reweigh aggravating and mitigating factors in reviewing a capital case, e.g., State v. Johnson, 147 Ariz. 395, 400, 710 P.2d 1050, 1055 (1985), that

de novo assessment is not the purport of its rulings holding that particular conduct falls outside the standard of heinousness or depravity. Whether the conduct qualifies as heinous or depraved is a threshold issue, and the Arizona Supreme Court's rulings on that issue are part of the process of defining the standard.' See Poland v. Arizona, 106

' If the Arizona Supreme Court's rulings on aggravation were simple de novo applications of the bare phrases "heinous" and "depraved," rather than being part of a process of narrowing construction, the sentencing system would probably be invalid for lack of standards offering sufficient guidance in determining who should be sentenced to death. See Gregg, 428 U.S. at 198, 260-03; Chaney, 801 F.2d at 1195. We consequently are reviewing the Arizona Supreme Court's definition and application of a standard. For that reason, we disagree with the views of the dissenting opinion that an examination of comparable Arizona cases should not be necessary, and that our review is confined to determining whether a rational factfinder could have determined Jeffers' crime to have been heinous or depraved.

S.Ct. 1749, 1755 (1986) ("aggravating circumstances are not separate penalties or offenses but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment.") (quoting Bullington v. Missouri, 451 U.S. 430, 438 (1981)). If the conduct is not heinous or depraved (and does not meet any of the other standards of aggravation), there is no opportunity for a discretionary act of mercy; state law then precludes the death penalty. Ariz. Rev. Stat. Ann. § 13-703(E)(1982). To apply the standard of especial heinousness and depravity to Jeffers case when the facts do not permit it is arbitrary or capricious, and is therefore an unconstitutional application of the standard. See Godfrey 446 U.S. at 428; Gretzler, 135 Ariz. at 50, 659 P.2d at 9 (constitutional error may occur by court straying in an individual case from

an otherwise constitutionally narrow construction).'[10]

We emphasize, therefore, the nature of our decision. We are not saying that Jeffers' conduct could not be punished by death under some different system of selecting penalties. Our ruling is simply that Arizona's existing standard of aggravation for murder committed in an

---

[10] Because we conclude that the application of the Arizona standard to Jeffers would violate the Eighth and Fourteenth Amendments, within the meaning of Godfrey and Gretzler, the writ may issue under 28 U.S.C. § 2254(d)(7) against Jeffers' death sentence. Jeffers' attack, and our analysis, is on the structure of the standard as applied to Jeffers. See Chaney, 801 F.2d at 1194 ("since Chaney's claim raises no factual issues, his challenge to the constitutionality of the Arizona death penalty statute as applied is a purely legal question"). We are not dealing here with a simple finding of fact of the Arizona Court, which binds us if fairly supported in the record. See id., at § 2254(d)(8); Woratzeck v. Ricketts, No. 85-2367, slip op. at 17-18 (9th Cir. June 25, 1987) (amended opinion).

"especially heinous . . . or depraved manner," as that standard has been defined and applied by the Supreme Court of Arizona, cannot be extended to Jeffers' case without losing its ability to distinguish in a principled manner between those it condemns to death and those it does not.

The writ must therefore issue to vacate Jeffers' sentence on his murder conviction, subject to the state's resentencing him consistently with the Constitution within a reasonable period of time. Our ruling makes it unnecessary for us to reach additional questions Jeffers raises concerning his death penalty.''

'' Among other issues, Jeffers contends that he is entitled to jury determinations of aggravating and mitigating factors. He is not. See Spaziano v. Florida, 468 U.S. 447, 460 (1984) (trial judge may override jury's recommendation of life imprisonment and sentence defendant to death).

CONCLUSION

The judgment of the district court is affirmed insofar as it upholds Jeffers' convictions of murder and aggravated assault, and his sentence on the assault conviction. The judgment is reversed insofar as it upholds Jeffers' death sentence. The case is remanded to the district court with instructions to issue a writ with regard to Jeffers' death sentence, subject to the State's resentencing him within a reasonable period of time.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Counsel

Donald S. Klein Esq.,

Frank P. Leto Esq.,

Tucson, Arizona

Counsel for Petitioner-Appellant

Gerald R. Grant Esq.,

Phoenix, Arizona

Counsel for Respondents-Appellees

WILSON, District Judge (Dissenting in part and concurring in part):

The majority concludes that the Arizona Supreme Court, in affirming petitioner's death sentence, adopted such a broad construction of Arizona Revised Statute § 13-703(F)(6) as to violate the Eighth and Fourteenth Amendments to the United States Constitution. Because I believe the majority is doing little more than second-guessing the Arizona Supreme Court's interpretation of facts that quite reasonably fit within the statutory definition of aggravating circumstances, I dissent.[1]

STANDARD OF REVIEW

Generally, a federal court in a habeas corpus proceeding must accord a presumption of correctness to a state

---

[1] I concur with the majority opinion to the extent it affirms petitioner's conviction.

court's factual findings.

28 U.S.C. § 2254(d). This statutory presumption, however, does not apply to questions of law or to mixed questions of law and fact. Sumner v. Mata, 455 U.S. 591, 597 1306 (1982); Fendler v. Goldsmith, 728 F.2d 1181, 1191 n. 21 (9th Cir. 1983). Rather, the federal court reviews such non-factual questions de novo. Chaney v. Lewis, 801 F.2d 1191, 1194 (9th Cir. 1986), cert. denied, 107 S. Ct. 1911 (1987); Fendler, 728 F.2d at 1191 n. 21 (federal courts are "obligated to conduct a complete and independent review of all purely legal or mixed fact and law questions raised by [a state prisoner's] habeas corpus petition").

Some federal courts in habeas proceedings have applied the presumption of correctness under § 2254(d) to state court findings of aggravating circumstances. See Woratzeck v.

Ricketts, 820 F.2d 1450, 1459 (9th Cir. 1987) (finding of "cruel, heinous, or depraved" aggravating circumstance by Arizona Supreme Court presumed correct under § 2254(d)); Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986) (existence of aggravating or mitigating circumstance a question of fact subject to review under § 2254(d)). These courts, however, appear to have applied the presumption without considering whether the finding of an aggravating circumstance is a question of fact or a mixed question of fact and law.

A state court conclusion that the defendant killed in a "heinous, cruel, or depraved" manner appears to be a mixed question of fact and law. Chaney, 801 F.2d at 1194. The court must first determine that the defendant engaged in certain conduct (e.g., beat the victim after she was dead), and then, by

reference to the decisions of the state supreme court, conclude that such conduct meaningfully distinguishes the defendant from the "usual or norm of first degree murders." As a mixed question of fact and law, the state court finding is not entitled to a presumption of correctness.[2]

On the other hand, the state court's conclusion that the defendant killed in a "heinous, cruel or depraved" manner should not be subject to de novo review.

---

[2]Even if the state court finding of aggravating circumstances is "essentially factual" so that it would be reviewed under the "clearly erroneous" standard if on direct appeal, see United States v. McConney, 728 F.2d 1195, 1199-1202 (9th Cir.) (en banc), cert. denied, 105 S. Ct. 101 (1984), it is not a [sic] an "issue of fact" subject to the presumption of correctness under § 2254(d). The presumption only applies to "basic, primary or historical facts: 'facts (in the sense of recital of external events and the credibility of their narrators).'" Fendler, 728 F.2d at 1191 n. 21 (quoting Townsend v. Sain, 372 U.S. 293, 309 n. 6 (1963)).

The United States Supreme Court has stated that its review of state court findings of aggravating circumstances is "limited to the question whether they are so unprincipled or arbitrary as to somehow violate the United States Constitution." Barclay v. Florida, 463 U.S. 939, 947, 103 S. Ct 3418, 3423 (1983) (plurality). The Ninth Circuit has interpreted this language to support deferential habeas corpus review of aggravating circumstances. Adamson v. Ricketts, 758 F.2d 441, 450 (9th Cir. 1985), withdrawn, 764 F.2d 1343, reh'g en banc, 789 F.2d 722, cert. granted, 107 S. Ct. 62 (1987).

Deferential review is justified by the presence of 'procedural protections intended to ensure that the death penalty will be imposed in a consistent, rational manner." Barclay, 463 U.S. at 960, (Stevens, concurring). Where the state's

sentencing procedures "focus discretion on 'the particularized nature of the crime and the particularized character of the defendant,' we lawfully may presume that [defendant's] death sentence was not 'wantonly and freakishly' imposed, and thus that the sentence is not disproportionate within any recognized meaning under the Eighth Amendment." McCleskey v. Kemp, 55 U.S.L.W. 4537, 4545 (U.S. Apr. 22, 1987) (emphasis added).[1]

---

[1]The Eleventh Circuit until recently held that these procedural protections not only raised a presumption that the sentence was imposed consistent with the Constitution, but foreclosed federal review:

> [w]here in a capital punishment case the state courts have acted through a properly drawn statute with appropriate standards to guide discretion, federal courts will not undertake a case-by-case comparison of the facts in a given case with the decisions of the state supreme court. This rule stands even though were we to retry the aggravating and mitigating circumstances in these

The Arizona capital sentencing process contains the appropriate checks on arbitrariness. The procedural protections include bifurcation of the penalty phase, statutorily-defined aggravating and mitigating circumstances which must be proved beyond a reasonable

---

> cases, 'we may at times reach results different from those reached in the Florida state courts."

Ford v. Strickland, 696 F.2d 804, 819 (11th Cir.) (en banc) cert. denied, 464 U.S. 865 (1983) (quoting Spinkellink v. Wainwright, 578 F.2d 582, 604-05 (5th Cir. 1978), cert. denied 440 U.S. 976 (1979)) (citations omitted).

The Eleventh Circuit has since abandoned its position of total deference to state court findings of aggravating and mitigating circumstances. In Magwood, 791 F.2d at 1449, the court held that a federal habeas corpus court is not precluded from reviewing state fact-findings that determine the existence of a particular aggravating or mitigating circumstance. The court additionally held that such findings are issues of fact, and are presumed to be correct under § 2254(d). Id.

doubt, written findings by the sentencing body, and automatic review by the state supreme court. See Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960 (1976). On review, the Arizona Supreme compares "each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate." Gregg v. Georgia, 428 U.S. 153, 198 (1976); State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51, cert. denied, 433 U.S. 915 (1976). Moreover, the Arizona Supreme Court has demonstrated an ability to rationally apply the statutory aggravating and mitigating circumstances. See State v. Gretzler, 135 Ariz. 42, 52-53, 659 P.2d 1, 11-12, cert. denied, 461 U.S. 971 (1983) and cases cited therein.

Where a state's capital sentencing process is procedurally sound and

responsibly managed, I believe the correct standard of review is "whether 'any rational factfinder' could have found the existence of aggravating circumstance[s]." Godfrey v. Georgia, 446 U.S. 420 (1980) (plurality) (White, J. dissenting) (quoting Jackson v. Virginia, 443 U.S. 307, 313 (1979)).[4]

CONSTITUTIONAL QUESTION

Despite the open-ended language contained in Ariz. Rev. Stat. § 13-703(F)(6), providing the penalty of death for those who commit murder in a "heinous, cruel, or depraved" manner, the Arizona death penalty statute passes constitutional muster by virtue of the narrowing constructions available through

---

[4]The majority does not identify the standard of review it applies in this habeas corpus proceeding, but it appears to be the "complete and independent" standard of review provided for in Fendler, 728 F.2d at 1191 n. 21.

the Arizona Supreme Court. Chaney v. Lewis, 801 F.2d at 1195. The majority, however, holds that the Arizona Supreme Court's application of the death penalty statute to petitioner violates the constitution.

A. Analysis Under the "Rational Factfinder" Standard of Review

The Supreme Court of Arizona has set forth in considerable detail those factors which support a finding that a murder was committed in an "especially heinous, cruel, or depraved" manner. See Gretzler, 135 Ariz. at 51-53, 659 P.2d at 10-12. In particular, the Arizona Supreme Court has identified the defendant's relishing of the killing and the infliction of gratuitous violence as two bases for finding a heinous or depraved attitude. Id. Given the parameters identified by the Arizona Supreme Court, I believe a "rational

factfinder" could have found the existence of aggravating circumstance § 13-703(F)(6).

The Arizona Supreme Court found that Jeffers had relished the killing:

> [W]hile Jeffers was beating the [dead] victim he called her "a bitch and a dirty snitch" and with each striking blow said, "This one is for so and so." [naming several names]. This evidences the relish with which appellant committed the murder. . . . [W]e find that the remarks made by appellant, while at the same time beating his victim, establish that the offense was committed in an especially heinous and depraved manner.[5]

State v. Jeffers, 135 Ariz. 404, 430, 661 P.2d 1105, 1131, cert. denied, 464 U.S. 865

---

[5]The Arizona Supreme Court's findings of historical facts, such as what Jeffers

(1983). This is a rational finding based on petitioner's words and actions.

The Supreme Court of Arizona additionally found that Jeffers had inflicted "gratuitous violence." Id. The record shows that Jeffers "climbed on top of the dead victim and hit her in the face several times which eventually resulted in additional wounds and bleeding." Id. Based on these facts, the Arizona Supreme Court could rationally find that the petitioner inflicted gratuitous violence: "In short, it was this additional violence, over and above that which was necessary to carry out the defendant's criminal intent, that in effect distinguishes the

---

said and did at the time of the killing, are presumed to be correct under 18 U.S.C. § 2254(d). The majority questions the strength of Van der Veer's testimony, see ante at 18 n. 4, but in no way shows that the state court findings are not "fairly supported by the record." 18 U.S.C. § 2254(d).

[defendant's murder] from the 'usual or the norm' of first degree murders.'" State v. Ceja, 115 Ariz. 413, 417, 565 P.2d 1274, 1278 (1977). In light of the factual grounds for finding that the petitioner "relished" the act of killing and inflicted "gratuitous violence," the Arizona Supreme Court could rationally conclude that Jeffers' committed murder in an "especially heinous, cruel, or depraved manner."

B. Analysis Under the De Novo or "Independent" Standard of Review

The majority acknowledges that the Arizona Supreme Court has adopted standards which narrow the class of first degree murderers who may be put to death, but concludes that a finding of aggravating circumstances under § 13-703(F)(6' "seems to call for conduct or attitudes more shocking than those exhibited by Jeffers." Ante at 17. In

holding that Jeffers' conduct is not sufficiently objectionable, this Court simply substitutes its judgment for the judgment of the Arizona Supreme Court. Nothing in the Eighth or Fourteenth Amendments permits this result.

The majority's reliance on Godfrey v. Georgia, 446 U.S. 420 (1980) (plurality) is misplaced. There the Georgia Supreme Court affirmed a death sentence without articulating how the defendant's actions differed from the norm of first degree murders. The United States Supreme Court reversed the death sentence, finding that it had been imposed in a "standardless and unchanneled" fashion. Id. at 429. As Justice Marshall wrote, it was not a question of whether the facts supported the jury's finding:

> As in any case raising issues of vagueness, the question is whether the court below has adopted so

ambiguous a construction of the relevant provision that the universe of cases it comprehends is impermissibly large, thus leaving undue discretion to the decisionmaker and creating intolerable dangers of arbitrariness and caprice."

446 U.S. at 420 n. 1 (concurring opinion).

The Arizona Supreme Court, unlike its counterpart in Godfrey, "has gone to great lengths to precisely define and correctly apply Ariz.Rev.Stat. § 13-703(F)(6)." Adamson v. Ricketts, 758 F.2d at 451. In finding that Jeffers committed his crime in a heinous or depraved manner, the Arizona Supreme Court identified the specific conduct which, in its judgment, set this murder apart from other first degree murder: (1) He climbed on to his dead victim; (2) repeatedly struck her in the face so

as to draw blood; (3) called her a [sic] "a bitch and a dirty snitch," and, (4) with each blow, said, "This one is for so and so." See State v. Jeffers, 135 Ariz. 404, 430, 661 P.2d 1105, 1131, cert. denied, 464 U.S. 865 (1983). The Arizona Supreme Court further explained how petitioner's conduct satisfied § 13-703(F)(6) under existing Arizona precedent. By repeatedly striking his victim in the face after she was dead, Jeffers inflicted "gratuitous violence," and by the remarks he made while inflicting this additional violence, Jeffers showed he "relished" the killing. Id.

The majority attacks this finding not on the basis that it is "standardless and unchanneled" under Godfrey, but that it does not comport with other decisions of the Arizona Supreme Court. The majority's conclusion that § 13-703(F)(6)

requires "conduct or attitudes more shocking than those exhibited by Jeffers," ante at 17, represents one possible reading of the Arizona death penalty statute and Arizona precedent, but the majority fails to show that this reading is constitutionally required. The Arizona Supreme Court may constitutionally impose the death sentence on petitioner provided the court consistently applies the death penalty statute to other defendants in Jeffers' position. The fact that Jeffers' conduct may lie close to the line separating ordinary first degree murders from "heinous, cruel, or depraved" killings -- and could be interpreted to fall below the threshold for imposing the death penalty under current Arizona case law -- does not give rise to a constitutional violation absent inconsistent

determinations by the Arizona Supreme Court.[6]

In an effort to show that the Arizona Supreme Court's decision in Jeffers was so unprincipled that it violated the constitution, the majority undertakes a selective review of other Arizona death penalty cases. The majority emphasizes those cases in which the defendant's conduct seemingly was more objectionable than Jeffers' but the Arizona Supreme

---

[6]"The majority in effect challenges the constitutionality of any capital sentencing system which recognizes an aggravating circumstance as open-ended as A.R.S. 13-703(F)(6). Inevitably, courts must draw difficult lines between ordinary first degree murder and those murders which are committed in an "especially heinous, cruel, or depraved" manner. But the constitution is satisfied where state courts draw lines based on "rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold [below which the death penalty cannot be imposed]." McClesky v. Kemp, 55 U.S.L.W. at 4544 (emphasis added).

Court did not find the defendant killed in a "heinous, cruel, or depraved" manner.[7] None of the cited cases, however, involved conduct similar to Jeffers', and little can be distilled from broad comparisons.

In State v. R.D. Smith, 138 Ariz. 79, 673 P.2d 17 (1983), the Arizona Supreme Court found that the only evidence of a heinous or depraved mind was the uncorroborated testimony of a

---

[7]These cases are relevant benchmarks to the extent that similar or worse conduct did not result in a finding of aggravating circumstances. They help to answer a threshold question: What is the minimum level of objectionable conduct required for a finding of aggravating circumstances under A.R.S. § 13-703(F)(6)? The decision in Jeffers is not undermined by those cases in which the Arizona Supreme Court found aggravating circumstances based on conduct more objectionable than Jeffers'. Such cases say very little about whether Jeffers' conduct meets the threshold below which the death penalty cannot be imposed.

codefendant that Smith, the defendant, had requested the tape "We Are The Champions" be played at some stage during the kidnap-rape-murder. The court found this to be insufficient evidence of heinousness or depravity, particularly in light of the defendant's suicide attempt, which was motivated in part by remorse. Id. at 86, 673 P.2d at 24. The finding in R.D. Smith is not inconsistent with the Arizona Supreme Court's finding that Jeffers "relished" the killing. Unlike the defendant in R.D. Smith, Jeffers made statements that directly captured the gusto with which he killed, at the time he killed."

"It is not clear that the defendant in R.D.Smith requested the tape be played while killing the victim, as opposed to raping her. Under Arizona case law, the defendant must "relish the murder" for § 13-703(F)(6) to be satisfied. See Gretzler, 135 Ariz. 52, 659 P.2d at 10.

In State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983), the court found insufficient evidence of a heinous or depraved attitude where the defendant, who was organically brain-damaged and highly impressionable, smiled while recounting that the victim "squealed like a rabbit" when shot. The court concluded that "[w]hatever statements Graham may have made about the killing are more likely attributable to his immaturity, nervousness and need to impress his peers than to a hardened attitude towards the death of another." Id. at 212, 660 P.2d at 463. No such charitable interpretation can be given to the statements of Jeffers, made while repeatedly striking his dead victim in the face.

In State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979), the Arizona Supreme Court found that the defendant had not committed murder in an especially "heinous, cruel, or

depraved" manner where he shot the victim in the back, told the groaning victim "Don't worry . . . it will be over soon" and shot the victim again. The court found that the defendant's words and actions, all in furtherance of a deliberate plan to "rip-off" a drug dealer and, in the process, impress other narcotics traffickers, failed to adequately distinguish the crime from other first degree murders. Id. at/ 40-41, 601 P.2d at 1324-25. Again, nothing in Brookover shows the Arizona Supreme Court inconsistently applied the death penalty statute to petitioner. Jeffers did not commit "cold and deliberate homicide" as in Brookover; rather, his words and actions show that he "relished" taking the life of a "dirty snitch."

The majority cites two additional cases to show the Arizona Supreme Court inconsistently found Jeffers to have

inflicted gratuitous violence. Both cases are readily distinguishable.

In State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1979), a robbery victim engaged the defendants in a shoot-out, and was shot four times in the back, the last time while face down on the floor. In finding that the killing was not committed in an especially "heinous, cruel, or depraved" manner, the Arizona Supreme Court looked to the victim's role in bringing about his own death. Id. at / 447-48, 586 P.2d at 1260. No such consideration is present here.

Likewise, State v. Poland, 144 Ariz. 388, 698 P.2d 183 (1985), aff'd, 106 S. Ct. 1749 (1986), fails to be instructive. There the court's inability to ascertain the exact circumstances of the victim's deaths precluded any finding that the murders

were heinous or depraved. Id. at 405, 698 P.2d at 200. Nothing in Poland suggests that Jeffers' words and actions, established firmly on the record, fail to show depravity or heinousness.

CONCLUSION

The foregoing case-by-case analysis should be unnecessary. As a federal habeas corpus court, we offer a limited forum for petitioner's collateral attack on his state court conviction and sentence. Our duty is to ensure that the petitioner is not being held in violation of the constitution. Our role does not extend to re-writing the law of Arizona to comport with our own interpretation of Arizona precedent. Where state courts are responsibly and consistently interpreting state death penalty statutes which have been held to be constitutional, our review should be

limited to whether "any rational factfinder" could have found the existence of aggravating circumstances.

0042D

APPENDIX B

ORDER

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed April 14, 1989]

JIMMIE WAYNE JEFFERS,	)	
	)	
Petitioner-Appellant,	)	CA No. 86-1840
	)	DC No. CV-85-945-ACM
-vs-	)	
	)	
JAMES R. RICKETTS, Director, Arizona Department of Corrections; DONALD WAWRZASZEK, Superintendent, Arizona State Prison,	)	ORDER
	)	
Respondents-Appellees.	)	

BEFORE: PREGERSON AND CANBY, CIRCUIT JUDGES AND WILSON, DISTRICT JUDGE*

A majority of the panel as constituted in the above case has voted to deny the

---

* The Honorable Stephen V. Wilson, United States District Judge for the Central District of California, sitting by designation.

petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

0042D jd

ORIGINAL

Supreme Court, U.S.
FILED
AUG 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89 - 189

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

JAMES R. RICKETTS, Director, Arizona Department of Corrections, and DONALD WAWRZASZEK, Superintendent, Arizona State Prison,

Petitioners,

- vs -

JIMMIE WAYNE JEFFERS,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, JIMMIE WAYNE JEFFERS, asks leave to file the accompanying Response to Petition For Writ Of Certiorari, without prepayment of costs and to proceed in forma pauperis. Respondent has been granted leave to so proceed before the United States Court of Appeals for the Ninth Circuit. Respondent's affidavit in support of this motion is attached hereto.

DATED this 30th day of August, 1989.

Law Offices
PIMA COUNTY PUBLIC DEFENDER

Donald S. Klein
DONALD S. KLEIN

FRANK P. LETO
ATTORNEYS FOR RESPONDENT

32 N. Stone, Fourth Floor
Tucson, Arizona 85701
Telephone No. (602) 740-5300

19 pp

IN FORMA PAUPERIS AFFIDAVIT

SUPREME COURT OF THE UNITED STATES
(Insert appropriate court)

JAMES R. RICKETTS, et seq.,
(Petitioner)

v.

JIMMIE WAYNE JEFFERS,
(Respondent (s)).

AFFIDAVIT IN SUPPORT
OF REQUEST
TO PROCEED
IN FORMA PAUPERIS

I, JIMMIE WAYNE JEFFERS, am the petitioner in the above entitled case. In support of my motion to proceed without being required to prepay fees or costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I declare that the responses which I have made below are true.

1. Are you presently employed? Yes ( ) No (X)
   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer. _____
   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received. 1978 $500 mo

2. Have you received within the past twelve months any money from any of the following sources?
   a. Business, profession or form of self-employment? Yes ( ) No (X)
   b. Rent payments, interest or dividends? Yes ( ) No ( )
   c. Pensions, annuities or life insurance payments? Yes ( ) No (X)
   d. Gifts or inheritances? Yes ( ) No (X)
   e. Any other sources? Yes (X) No ( )

   If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. FRIENDS SEND MONEY FOR STAMPS.

3. Do you own cash, or do you have money in a checking or savings account?

   Yes (X) No (X) (Include any funds in prison accounts.)

   If the answer is "yes," state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   Yes ( ) No (X)

   If the answer is "yes," describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute to their support NONE

I understand that a false statement or answer to any questions in this declaration will subject me to penalties for perjury.

Jimmie W. Jeffers
(Signature)

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 6TH day of Aug 1989.

Jimmie W. Jeffers
(Petitioner's Signature)

CERTIFICATE

I hereby certify that the petitioner herein has the sum of $19.27 on account to his credit at the ASPC-F (on 8-14-89) institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said _____ institution:

Carl Scott CO II
Authorized Officer of Institution

NO. 89 - 1x9

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JAMES G. RICKETTS, Director, Arizona Department of Corrections, and DONALD WAWRZASZEK, Superintendent of the Arizona State Prison,

Petitioners,

v.

JIMMIE WAYNE JEFFERS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

SUSAN A. KETTLEWELL,
Pima County Public Defender

*DONALD S. KLEIN
FRANK P. LETO

Deputy Public Defenders
PIMA COUNTY PUBLIC DEFENDER'S OFFICE
32 N. Stone, Fourth Floor
Tucson, AZ 85701
(602) 740-5300

ATTORNEYS FOR RESPONDENT
*Counsel of Record

QUESTION PRESENTED

1. May a federal court independently determine whether a State's application of its "especially heinous ... or depraved" aggravating circumstance to a capital defendant violates the Eighth Amendment principles of Godfrey v. Georgia, 446 U.S. 420 (1980)?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

REASONS FOR DENYING THE WRIT

The decision of the court below was a straight forward application of Godfrey v. Georgia 2

CONCLUSION 10

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

CASES PAGE

Adamson v. Ricketts, 865 F.2d 1011 1016 (9th Cir. 1988) cert. pending 2, 3, 5

Cartwright v. Maynard, 822 F.2d 1477, 1487-8 (10th Cir. 1987) . 4

Godfrey v. Georgia, 446 U.S. 420 (1982) 2-4, 7, 8, 9, 10

Jeffers v. Ricketts, 832 F.2d 476, 482 (9th Cir. 1987) 2, 3, 5, 8

Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986) 4

Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853 100 L.Ed.2d 372 (1988) 3, 4, 5, 7, 8, 9, 10

McCleskay v. Kemp, ___ U.S. ___, 107 S.Ct. 1756 95 L.Ed.2d 262 (1987) 3

State v. Arias, 131 Ariz. 441, 641 P.2d 1285 (1982) 8

State v. Billhymer, 114 Ariz. 390, 561 P.2d 311 (1977) 8

State v. Blazak, 131 Ariz. 598, 643 P.2d 694 (1982) 8

State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979) 6

State v. Ceja, 126 Ariz. 35, 612 P.2d 491 (1980) 6

State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981) 8

State v. Cookus, 115 Ariz. 99, 563 P.2d 898 (1977) 8

State v. Encinas, 132 Ariz. 493, 647 P.2d 624 (1982) 8

State v. Fierro, 124 Ariz. 182, 603 P.2d 74 (1979) 8

State v. Garcia, 133 Ariz. 522, 652 P.2d 1045 (1982) 8

State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983) 5, 6

State v. Gretzler, 135 Ariz. 42, 52-3 659 P.2d 1, 11-12 (1983) 8

State v. Hensley, 142 Ariz. 598, 691 P.2d 689 (1984) 7

State v. Jeffers, 135 Ariz. 404, 621 P.2d 1105 (1983) . . 2, 3, 6

State v. Luian, 124 Ariz. 365, 604 P.2d 629 (1979) 8

State v. Madsen, 125 Ariz. 342, 609 P.2d 1046 (1980) 7

State v. Poland, 144 Ariz. 388, 698 P.2d 183 (1985) 7

State v. Purcell, 117 Ariz. 305, 572 P.2d 439 (1977) 8

State v. R.D. Smith, 138 Ariz. 79, 673 P.2d 17 (1983) 5

State v. Thomas, 133 Ariz. 533, 652 P.2d 1380 (1982) 8

State v. Watkins, 133 Ariz. 1, 648 P.2d 116 (1982) 7

State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978) 6

State v. Wiley, 144 Ariz. 525, 698 P.2d 1244 (1985) 8

State v. Williams, 133 Ariz. 220, 650 P.2d 1202 (1982) . . 7, 8

Moratzeck v. Ricketts, 820 F.2d 1450 (9th Cir. 1987)
cert granted, 108 S.Ct. 2815 (1988) 4

ARIZONA REVISED STATUTES

A.R.S. 13-703(F)(6) 2

UNITED STATES STATUTES

28 U.S.C. §1254(1) 1

NO. 89 - 189

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

JAMES G. RICKETTS, Director, Arizona Department of Corrections, and DONALD WAWRZASZEK, Superintendent of the Arizona State Prison,

Petitioners,

v.

JIMMIE WAYNE JEFFERS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Jimmie Wayne Jeffers, respectfully requests that this Court deny the Petition for Writ of Certiorari which seeks review of the decision of the Ninth Circuit Court of Appeals entered in this case on November 9, 1987.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 832 F.2d 476 (1987). (See also, Petitioner's Appendix A).

JURISDICTION

The Ninth Circuit Court of Appeals entered its judgment in this case on November 9, 1987. Request for rehearing and suggestion for a rehearing en banc was denied by order dated April 14, 1989. On August 8, 1989, Respondent was granted to and including August 30, 1989 to file his response to the Petition for Writ of Certiorari. The statutory provision relied on by the Petitioner to invoke jurisdiction is 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

United States Constitution Amendment VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution Amendment XIV: No State shall ... deprive any person of life, liberty, or property, without due process of law ... .

REASONS FOR DENYING WRIT

I. THE DECISION OF THE COURT BELOW WAS A STRAIGHT FORWARD APPLICATION OF GODFREY V. GEORGIA.

Nothing about the Court of Appeals' decision below calls for review on certiorari by this Court.

The focus of the panel's decision was the uniquely broad language of the Arizona statutory aggravating circumstance "especially heinous ... or depraved."[1] Jeffers v. Ricketts, 832 F.2d 476, 482 (9th Cir. 1987). That was the only aggravating factor found in this case. The panel's decision did not involve the aggravating circumstance "cruelty." The Arizona Supreme Court explicitly held that the circumstances of the case did not establish "cruelty." State v. Jeffers, 135 Ariz. 404, 429, 621 P.2d 1105 (1983).[2] The panel examined previous Arizona decisions in light of Godfrey v. Georgia, 446 U.S. 420 (1980) and concluded that the "especially heinous ... or depraved"[3] aggravating circumstance was not constitutionally applied to Respondent

---

[1] See, Arizona Rev.Stat. 13-703(F)(6)

> "F. Aggravating circumstances to be considered shall be the following: ... 6. The defendant committed the offense in an especially heinous, cruel or depraved manner."

[2] Since the Arizona Supreme Court held that the killing was not "cruel", those Arizona cases concerned with the concept of "cruelty" - such as Adamson v. Ricketts, 865 F.2d 1011, 1016 (9th Cir. 1988) cert. pending. - do not control the disposition of this case. Rather, the instant case is limited to that subcategory of cases involving the more subjective and amorphous statutory terms "heinous or d praved." Jeffers v. Ricketts, supra, 832 F.2d at 483.

[3] The Arizona statute is written in the disjunctive. This gives rise to an additional constitutional problem because a disjunctive statute may prevent a properly narrow construction. Godfrey v. Georgia, 446 U.S. at 454 (White, J. dissenting) (aggravating circumstance in disjunctive "would arguably be assailable on constitutional grounds").

Jeffers. 832 F.2d at 483-4.

The Godfrey analysis applied by the panel has since been approved and reaffirmed by this Court in Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). The analysis of the panel establishes nothing in the way of federal law that Maynard did not establish only over one year ago. id. 100 L.Ed.2d at 381. The analysis of the panel is that kind of analysis of state law this Court usually leaves to the respective courts of appeals. id. 100 L.Ed.2d at 379-380. Consequently, the analysis and holding of the panel in this case presents no occasion for this Court's review, the panel did not misapply Godfrey, and the State's Petition for Certiorari should be denied.

Petitioner claims that this case presents the question of the appropriate federal standard courts should apply in reviewing state court findings of aggravating circumstances and that the decision of the panel did not properly defer to the state court's assessment of the facts (Petition, pp. 10-11). The panel properly deferred to and applied the historical facts as found by the Arizona Supreme Court. Compare, Jeffers v. Ricketts, 832 F.2d at 478, 484-5, with, State v. Jeffers, 135 Ariz. at 412, 429-30. As to the appropriate standard of review applicable to aggravating circumstances, the panel was aware of and applied the standard from McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) that a constitutional violation only arises when the "capital punishment system operates in an arbitrary and capricious manner ... ." Jeffers, 832 F.2d at 485-6. In this case, the panel concluded that the death penalty was imposed against Jeffers in an "arbitrary and capricious manner." 832 F.2d at 486. Thus, Petitioner is mistaken when it claims that this case raises a significant question concerning the appropriate standard to be applied in the federal courts and that the panel did not defer to the state court's findings of fact.

Petitioner also claims there is a conflict within the Circuits over the appropriate standard for reviewing aggravating

circumstances. Petitioner cites Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986) to illustrate the seeming conflict that exists within the Circuits. Examination reveals that no such conflict exists. In Magwood, supra, the Court of Appeals affirmed the District Court's granting of the defendant's writ of habeas corpus on the ground that the state court erroneously rejected two mitigating circumstances during sentencing. 791 F.2d at 1440. In upholding the District Court's decision, the Court of Appeals held that it would not re-evaluate the weight given to a particular aggravating or mitigating circumstance, but that it would re-evaluate the existence of a particular aggravating or mitigating circumstance. 791 F.2d at 1449. Moreover, unlike the instant case, the Magwood court was not faced with a Godfrey v. Georgia/Maynard v. Cartwright attack on a particular aggravating circumstance and the court said nothing about the standard of review applicable to such an attack. id. 791 F.2d at 1447-50. Consequently, the panel's decision in the instant case does not conflict with the Eleventh Circuit's decision in Magwood and Petitioner's claim is unpersuasive.

To illustrate that a seeming conflict exists within the Ninth Circuit, Petitioner cites Woratzeck v. Ricketts, 820 F.2d 1450 (9th Cir. 1987) cert granted, 108 S.Ct. 2815 (1988). The decision in Woratzeck has been vacated by the Court of Appeals and remanded to the District Court following an order from this Court "for further consideration in light of Maynard v. Cartwright ... ." See Woratzeck v. Ricketts, 859 F.2d 1359 (9th Cir. 1988). The panel in the instant case applied a Maynard type analysis to the circumstances of the case and, consequently, there is no conflict within the Ninth Circuit on this point.

Petitioner next complains that the panel decision incorrectly applied Arizona law when it surveyed prior Arizona decisions which defined and applied the "especially heinous or depraved" aggravating circumstance. The analysis employed by the panel was similar to that employed by the Tenth Circuit in Cartwright v. Maynard, 822 F.2d 1477, 1487-8 (10th Cir. 1987) and

approved by this Court in Maynard v. Cartwright, supra, 100 L.Ed.2d at 379. Consequently, Petitioner's complaint about the panel's analysis is not well taken.

Petitioner also complains that certain differences between other Arizona cases and Respondent's case somehow establish that Respondent's conduct was especially heinous or depraved. There are two defects with Petitioner's complaint. First, the "differences" mentioned by Petitioner in no way meaningfully distinguish Respondent's case from those cases where the aggravating circumstance in question was not found. Second, Petitioner has selected only a small number of cases to illustrate its complaint; of equal significance are numerous cases Petitioner omits from its examination.

The killings mentioned by Petitioner which were not found "heinous" or "depraved" well illustrate the unpredictable application of this statute:

In State v. R.D. Smith, 138 Ariz. 673 P.2d 17 (1983), the victim was repeatedly raped by Smith prior to her murder. She was then choked, stabbed, her throat cut, and her head crushed with a rock. id. 673 P.2d at 22. Smith requested playing the song "We Are The Champions." 673 P.2d at 23-4. Petitioner argues the evidence of Smith's heinous or depraved attitude was "equivocal" because the source was an accomplice. Yet, in Respondent's case, the source of evidence against him was the testimony of Doris Vanderveer, who testified under a grant of immunity. Jeffers, 832 F.2d at 479, 484, fn. 4. That the source of evidence against a capital defendant comes from an accomplice rather than an immunized witness has nothing to do with the definition of "heinous or depraved."

In State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983), the defendant obtained a rifle and fired two shots at the victim as he answered his front door. In describing the killing to his friends, Graham "smiled as he told them the victim 'squealed like a rabbit' when he was shot." 660 P.2d at 463. Petitioner points to the fact that the defendant in Graham presented mitigating

evidence as to his mental condition; but that makes no difference with respect to the application of the "heinous or depraved" aggravating circumstance.

In State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979), the victim was shot in the back with a .38 caliber revolver. The victim fell to the floor and complained "it hurts." The defendant then said "don't worry, buddy, it will be okay" and shot the victim again in the back. The victim's body was taken to a parking lot at the airport and abandoned. 124 Ariz. at 40. Petitioner emphasizes that the defendant in Brookover shot the victim twice in relatively quick succession; but that does not meaningfully distinguish that case from the instant case where Cheney was rendered unconscious with an overdose of drugs and did not suffer. See Jeffers, 135 Ariz. at 429.

In State v. Ceja, 126 Ariz. 35, 612 P.2d 491 (1980), the defendant murdered a husband and wife during a drug robbery. Prior to the killing, the defendant bragged that he was going to "rub out a dude" and "rip him off." 612 P.2d at 495. The defendant shot the wife seven times, at least four times in the head and twice in the chest. The defendant shot the husband four times, twice at close range. The husband was kicked in the face after losing consciousness. 612 P.2d at 493. How Respondent's conduct showed an especially heinous or depraved determination to kill, but Ceja's did not, is impossible to fathom.

In State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), the defendant and codefendant entered the victim's home in order to commit a burglary. When the defendant went upstairs, the victim obtained a gun and shot at the codefendant. The defendant came down stairs and shot the victim in the back four times, the last time while the victim was lying face down on the floor. Petitioner points out that defendant Watson sought out and shot the victim during a residential burglary in order to aid his codefendant's escape; but that does nothing to establish the definition of the "heinous or depraved" aggravating circumstance in the instant case.

In State v. Poland, 144 Ariz. 388, 698 P.2d 183 (1985), the defendants disguised themselves as police officers and robbed a Purolator van of more than $300,000.00. Two Purolator guards were placed in canvas bags containing rocks and dumped in Lake Mead. One guard died by drowning and the other by either drowning or a heart attack. The bodies were in the water at least two weeks and found three-four weeks later. 144 Ariz. at 393. That the state of mind of the defendants in Poland could not be established because no witness survived to show how the victims were killed and dumped into the lake is irrelevant to the definition of the aggravating circumstance applied in the instant case.

To determine whether the Arizona Supreme Court has constitutionally applied the "especially heinous or depraved" aggravating circumstance, the list of cases examined could - but need not - stop there. A broader examination of Arizona case law reveals that "the list of considerations ... the Arizona Supreme Court has been willing to use to support one of the three terms that comprise its especially heinous aggravating factor is extremely broad." Rosen, The Especially Heinous Aggravating Circumstance in Capital Cases - the Standardless Standard, 64 N.C.L. Rev. 941, 981 (1986). "Whenever anything about a murder has proved offensive to the court, ... it has approved [this factor]." Rosen, 64 N.C.L. Rev. at 981 (emphasis in original). For example, in a number of cases the aggravating circumstance "especially heinous or depraved" was either not found or such finding was reversed, even though the cases involved "apparent relishing" of the murder,[4] gratuitous violence,[5] and/or

---

[4] State v. Madsen, 125 Ariz. 342, 609 P.2d 1046 (1980) (defendant practiced crying to fake grief and bragged that it was "easy" to kill someone for insurance money); State v. Williams, 133 Ariz. 220, 650 P.2d 1202 (1982) (defendant wrote "the bitch" in the dirt near the victim's body); State v. Watkins, 133 Ariz. 1, 648 P.2d 116 (1982) (when police arrived, defendant told them the victim "must have been very sick, he's throwing up blood"); State v. Hensley, 142 Ariz. 598, 691 P.2d 689 (1984) (defendant bragged that he "left no witnesses" after killing two individuals).

"needless" mutilation.[6] Similarly, the "mere existence of the ... helplessness of the victim, in isolation, does not always lead to a holding that the crime is heinous" see State v. Gretzler, 135 Ariz. 42, 52-3, 659 P.2d 1, 11-12 (1983), but in several cases it has.[7] A fuller review of this broader list of factors and cases reveals that Petitioner has not fully confronted the inconsistent application of the "especially heinous or depraved" aggravating circumstance. The panel's analysis - consistent with both Godfrey and Maynard - establishes that fact. But its holding is properly narrow: it only concludes that the aggravating circumstance in question has been unconstitutionally applied to Respondent in this case. Jeffers, 832 F.2d at 485-6.

In sum, Petitioner's claim that the panel misapplied Arizona case law in unpersuasive because, as the panel pointed out, there is no meaningful way to distinguish Jeffer's case in which the aggravating circumstance of especially heinous or depraved was found from those cases in which it was not. 832 F.2d at 486. That Petitioner can conjure up facts to distinguish the instant

---

[5]State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981) (victim strangled, beaten, lacerated "over the entire body", and had a ligature tied around her neck); State v. Fierro, 124 Ariz. 182, 603 P.2d 74 (1979) (victim shot five times); State v. Cookus, 115 Ariz. 99, 563 P.2d 898 (1977) (victim beaten with rocks, then shot six times); State v. Billhymer, 114 Ariz. 390, 561 P.2d 311 (1977) (nude, bound victims repeatedly stabbed); State v. Encinas, 132 Ariz. 493, 647 P.2d 624 (1982) (victim beaten, run over with car, stabbed 30 times); State v. Thomas, 133 Ariz. 533, 652 P.2d 1380 (1982) (victim stabbed twice and throat cut).

[6]State v. Williams, 133 Ariz. 220, 650 P.2d 1202 (1982) (victim killed by a stab wound in the temple, had lacerations on her throat and forehead); State v. Christensen, supra, 129 Ariz. 32 (victim strangled and beaten); State v. Purcell, 117 Ariz. 305, 572 P.2d 439 (1977) (victim beaten with butt of shotgun, then repeatedly shot in chest).

[7]Cases involving apparent "senselessness" or "helplessness" where no finding of heinousness include: State v. Wiley, 144 Ariz. 525, 698 P.2d 1244 (1985) (70 year old burglary victim bound and beaten, died of smoke inhalation); State v. Blazak, 131 Ariz. 598, 643 P.2d 694 (1982) (murder of innocent bystander to robbery); State v. Arias, 131 Ariz. 441, 641 P.2d 1285 (1982) (81 year old woman bound, gagged, and strangled during burglary); State v. Luian, 124 Ariz. 365, 604 P.2d 629 (1979) (unconscious robbery victim stabbed to death); State v. Garcia, 133 Ariz. 522, 652 P.2d 1045 (1982) (victim repeatedly beaten over the head with a pipe during robbery).

case from other cases[8] does not undermine the panel's analysis. The conclusion of the panel - supported by Godfrey and Maynard - is that the aggravating circumstance of especially heinous or depraved was not constitutionally applied to Respondent under the circumstances of his case. This decision is not in need of review by this Court.

---

[8]As shown by examination of the cases cited by Petitioner, many of Petitioner's distinctions concern mitigating and/or evidentiary issues wholly separate from the facts the Arizona Supreme Court has said are relevant to the "especially heinous or depraved" aggravating circumstance. Thus, the distinctions are not meaningful to determine the existence of the aggravating circumstance in questions.

CONCLUSION

The decision below was a correct application of Godfrey v. Georgia (as approved in Maynard v. Cartwright), the decision does not conflict with decisions in the Ninth Circuit or within other circuits, and the decision correctly acknowledged and evaluated State law. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted

SUSAN A. KETTLEWELL,
Pima County Public Defender

Donald S. Klein

*DONALD S. KLEIN
FRANK P. LETO

Deputy Public Defenders
PIMA COUNTY PUBLIC DEFENDER'S OFFICE
32 N. Stone, Fourth Floor
Tucson, AZ 85701
(602) 740-5300

ATTORNEYS FOR RESPONDENT
*Counsel of Record

STATE OF ARIZONA)
) ss.
County of Pima)

DONALD S. KLEIN, a member of the bar of this Court, being duly sworn upon oath, deposes and says: that he served three (3) copies of the Response to Petition for Writ upon

Gerald R. Grant
Assistant Attorney General
Department of Law
1275 W. Washington
Phoenix, AZ 85007

by depositing the same in the United State's mail, with first class postage prepaid.

DATED this 30th day of August, 1989.

Donald S. Klein
DONALD S. KLEIN
Attorney for Respondent

SUBSCRIBED AND SWORN TO BEFORE me this 30th day of August, 1989, by DONALD S. KLEIN.

NOTARY PUBLIC

My Commission Expires:

My Commission Expires: 2, 1992

(3)

No. 89-189

Supreme Court, U.S.
FILED
NOV 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

SAMUEL A. LEWIS, Director, Arizona Department of Corrections, and DONALD WAWRZASZEK, Superintendent, Arizona State Prison,

Petitioners,

vs.

JIMMIE WAYNE JEFFERS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

ROBERT K. CORBIN
Attorney General of
the State of Arizona

JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division

GERALD R. GRANT*
Assistant Attorney General
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542-4686

Counsel for PETITIONERS

JAMES S. LIEBMAN*
435 West 116th Street
Box B-16
New York, New York 10027
Telephone: (212) 854-3423

SUSAN A. KETTLEWELL
Pima County Public Defender
DONALD S. KLEIN
FRANK P. LETO
Assistant Public Defenders
32 North Stone, Fourth Floor
Tucson, Arizona 85701
Telephone: (602) 740-5300

Counsel for RESPONDENT

*Counsel of Record

Petition For Certiorari Filed July 13, 1989
Certiorari Granted October 10, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

List of Relevant Docket Entries 1

Record Transcript of February 21, 1978, March 6, 1978, and April 14, 1978 (Posttrial Motions, Sentencing) (excerpt). 4

Record Transcript of June 20, 1980 and July 10, 1980 (Resentencing) (excerpt)..... 11

Opinion of Arizona Supreme Court (January 24, 1983). 17

The following opinion and order have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Opinion of the United States Court of Appeals for the Ninth Circuit, dated November 9, 1987..... A-1

Order of the United States Court of Appeals for the Ninth Circuit denying petition for rehearing and rejecting suggestion for rehearing en banc, dated April 14, 1989..... B-1

LIST OF RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DATE	NR	PROCEEDINGS
Dec. 2, 1983	1	Petition for Writ of Habeas Corpus
Dec. 2, 1983	2	Memorandum in Support of Petition
Dec. 2, 1983	3	Application for Stay of Execution
Dec. 2, 1983	6	Supplemental Memorandum in Support of Application for Stay of Execution
Dec. 20, 1983	10	Answer
Dec. 20, 1983	12	First Amended Petition for Writ of Habeas Corpus
Jan. 6, 1984	14	Answer to Amended Petition
Jan. 6, 1984	15	Notice of Filing of Transcripts
Jan. 6, 1984	15a	List of Transcripts
Jan. 19, 1984	18	Motion to Submit Petitioner's Briefs on Appeal
Jan. 19, 1984	19	Motion to Require Appropriate Answer
Jan. 19, 1984	20	Supporting Memorandum
Jan. 19, 1984	21	Motion to Expand the Record

Mar. 6, 1984	29	Response to Motion to Expand the Record
Mar. 6, 1984	30	Response to Motion to Require Appropriate Answer
Apr. 11, 1984	32	Reply (Motion to Submit Briefs)
Apr. 11, 1984	33	Reply (Motion to Require Appropriate Answer)
July 18, 1984		Minute Entry Regarding Pending Motions
July 30, 1984	36	Amended Answer
July 30, 1984	37	Notice of Filing Transcripts
July 30, 1984	37a	List of Transcripts
May 27, 1985	42	Supplement to Amended Answer
Feb. 4, 1986	2	Order
Feb. 4, 1986	3	Judgment
Feb. 27, 1986	4	Notice of Appeal
Feb. 27, 1986	5	Motion for Leave to Proceed on Appeal in Forma Pauperis
Feb. 27, 1986	6	Supporting Affidavit
Feb. 28, 1986	7	Order

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DATE	PROCEEDINGS
Aug. 22, 1986	Opening Brief
Nov. 10, 1986	Answering Brief
Dec. 22, 1986	Reply Brief
Nov. 9, 1987	Ninth Circuit Opinion
Nov. 20, 1987	Petition for Rehearing
Apr. 14, 1989	Order Denying Rehearing

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,
Plaintiff,
vs.
JIMMIE WAYNE JEFFERS,
Defendant.

No. A-31934
(Filed July 6, 1978)

Tucson, Arizona
February 21, 1978
March 6, 1978
April 14, 1978

BEFORE: The Hon. Ben C. Birdsall, Judge

APPEARANCES:

James Himelic, Esq., Deputy County Attorney, appearing on behalf of the State

Thomas E. Higgins, Jr., Esq., and James W. Stuehringer, Esq., Attorneys-at-Law, appearing on behalf of the Defendant

POSTTRIAL MOTIONS
SENTENCING

Bruce E. Johnson
Official Court Reporter

* * *

(p. 33) THE COURT: Is this matter submitted, does anybody have anything further?

MR. STUEHRINGER: Just a couple of other matters.

I would like the Court, if it would, to make a finding for the record on what it deemed to be the applicable burden of proof.

THE COURT: It's my understanding the burden of proof is beyond a reasonable doubt.

MR. STUEHRINGER: And I would also like a finding if Miss Dorris Van Der Veer was an accomplice or co-conspirator.

THE COURT: First of all, in Case No. A-32012, this was set for trial yesterday and I purposely had it brought in again this morning.

I'm going to carry it over on the calendar until Tuesday morning of next week at nine o'clock.

Now, I want to proceed with judgment at this time.

The defendant was found guilty by a jury in this court of murder in the first degree, Count 1, and Count 2, assault with a (p. 84) deadly weapon, a gun.

Is there any legal cause to show why judgment should not now be pronounced?

MR. STUEHRINGER: There is none, Your Honor.

MR. HIMELIC: No, Your Honor.

THE COURT: No legal cause appearing, it is the judgment of the Court that the defendant is guilty of those two crimes.

Now, the Court is going to proceed with a special verdict as required under the statute with regard to the

existence or non-existence of aggravated, mitigating circumstances as set forth in the statute.

The Court, first of all, in regard to the aggravating circumstances, makes the following findings:

First. An aggravating circumstance, number one, the Court finds that the defendant has not been convicted of another offense in the United States for which, under Arizona law, a sentence of life imprisonment or death was imposable.

Second. The Court finds that the defendant has not been previously convicted of a felony in the United States involving the use (p. 85) of threats or violence on another person.

With regard to both of those, the Court finds that aggravating circumstances do not exist.

No. 3. The Court finds that in the commission of this offense, the first degree murder offense, the defendant did knowingly create a grave risk of death to another person, to-wit, Dorris Van Der Veer, in addition to the victim of the offense.

No. 4. The Court finds that that aggravating circumstance does not exist, that being that the commission of the offense was procured by payment or promise of payment.

5. The Court finds that aggravating circumstance does not exist and that is that the offense was not committed as consideration for the receipt or in expectation of the receipt of anything of pecuniary value.

6. The court does find that the defendant committed this offense in a specially heinous, cruel and depraved manner.

With regard to the mitigating circumstances, the Court finds the following findings:

Mitigating Circumstance No. 1. (p. 86) That is the mitigating circumstance as to whether or not the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution. The Court finds that that mitigating circumstance does not exist.

Mitigating Circumstance 2, as to whether or not the defendant was under unusual and substantial duress although not such as to constitute a defense to prosecution. The Court finds that that mitigating circumstance does not exist.

Mitigating Circumstance No. 3, whether the defendant was a principal in an offense committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to the prosecution. That mitigating circumstance does not exist.

The last, whether the defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause or would create a grave risk of causing death to another person. The Court finds that mitigating (p. 87) circumstance does not exist.

You have asked me to make a finding as to whether or not Dorris Van Der Veer was an accomplice. The Court finds that she was not.

That concludes the special verdict findings.

Are you ready to proceed with the sentencing at this time?

MR. STUEHRINGER: If the Court please, if I could request one further finding.

The Court's conclusion with respect to the second aggravating circumstance, that is heinous, cruel or depraved. Was the Court's opinion based on the conduct of the defendant before or after the death

THE COURT: The Court has considered the defendant's behavior in committing the crime after the death of the victim.

I think I should further say for the record, since you have argued to the Court that mitigating circumstances 1 and 2 existed, that if those circumstances did exist as you have argued to me, they did exist, that they would not in the Court's judgment be sufficiently substantial to call for leniency in view of the aggravating circumstances in this case.

(p. 88) Are you read [sic] to proceed with the sentencing?

MR. STUEHRINGER: Yes, I am.

THE COURT: Is the State ready?

MR. HIMELIC: Yes, Your Honor.

THE COURT: First of all, before the sentencing, I want to advise the defendant that you have a right to appeal and, in fact, in regard to the charge of first degree murder, there will be an automatic appeal filed by the clerk of the court from the jury verdict, from the judgment of guilt, and from the sentence which is to be pronounced in this case.

Notice of appeal must be filed within 20 days from this date with the exception that I noticed on the first degree murder charge.

You are entitled to be represented by attorneys in connection with your appeal and if you cannot afford an attorney, to have an attorney appointed to represent you.

Your court-appointed attorneys will continue to represent you unless and until there is some change made without cost to you.

Do you understand these rights

THE DEFENDANT: (No reply.)

THE COURT: Have any question you want (p. 89) to as about the rights?

THE DEFENDANT: (No reply.)

THE COURT: All right. The Court on Count 2, the charge of assault with a deadly weapon, a gun, is going to sentence the defendant to the custody of the State Department of Corrections for a period of not less than five nor more than ten years. The sentence is to commence as of February 2nd, 1977, which gives the defendant credit for all of the time he has spent in the Pima County Jail.

This sentence is to run consecutively with the defendant's sentences in Pima County Superior Court Case Nos. A-28341, A-30478, A-30339, and the defendant's sentences in the United States District Court, No. CR-77142, Tucson, W.C.F.

On Count 1, the first degree murder charge, the Court, having found two aggravating circumstances and no mitigating circumstances, it is the sentence of this Court that the defendant be sentenced to death.

• • •

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA, Plaintiff, vs. JIMMIE WAYNE JEFFERS, Defendant.	)	No. A-31934 (Filed Sept 5, 1980)

Tucson, Arizona
June 20, 1980
July 10, 1980

BEFORE: The Hon. Ben C. Birdsall, Judge Division No. IX

APPEARANCES:

James Himelic, Esq., and D. Jesse Smith, Esq., Deputy County Attorneys, appearing in behalf of the State

Donald Klein, Esq., and James W. Stuehringer, Esq., Attorneys-at-Law, appearing on behalf of the Defendant

RESENTENCING

Bruce E. Johnson
Official Court Reporter

• • •

(p. 211) THE COURT: This case is already on appeal before the Arizona Supreme Court and this resentencing (p. 212) will be incorporated in that appeal.

I don't believe that it's necessary that the Court advise the defendant of any rights of appeal orally or in writing. Do you agree?

MR. KLEIN: I agree. I think the only requirement is the State notify the Supreme Court of the reinstatement of the appeal.

THE COURT: All right. The Court has prepared and returned a Special Verdict on the conviction of first degree murder pursuant to the statute and I'm going to read that into the record at this time.

Pursuant to A.R.S. 13-454, now 13-703, the defendant having been convicted of the crime of first degree murder, the Court makes the following findings as to the existence or non-existence of each of the circumstances set forth in Subsection F, aggravating circumstances thereof, and as to the existen-e [sic] of any of the circumstances included in Subsection G, mitigating circumstances, thereof:

Aggravating Circumstances, Subsection F: The Court finds that aggravating circumstances set forth in paragraphs 1, 2, 4 and 5 of said subsection do not exist.

The Court further finds that the aggravating circumstance set forth in subparagraph 6 does exist. The (p. 213) defendant committed the offense of first degree murder in an especially heinous, cruel and depraved manner.

In October, 1976, the defendant was staying in a Tucson motel with a female friend, Doris Van Der Veer,

who subsequently gave the police information leading to his arrest, and was the state's principal witness in the trial of this case. On the afternoon of that day, on the defendant's invitation, the victim, Penelope Cheney, a female person age 26, came to that motel room at which time Doris Van Der Veer left and remained outside for a period of approximately two hours.

Alone with the victim in the motel room, the defendant proceeded to give her heroin which she administered herself or which he administered to her. She was an heroin addict. After the initial injections, the defendant subsequently injected large dosages of heroin into the victim.

When Doris Van Der Veer returned to the room, the victim was lying part on and part off the bed on her back. She was cyanotic. The defendant had a gun in his hand and after order [sic] Van Der Veer to lock the door and stay in the room, he tied the victim's arms and injected some additional heroin into her hand.

He asked Van Der Veer to check the victim and see if she was still alive. Van Der Veer did and (p. 214) and [sic] determined that the victim was still breathing although there was hardly any pulse, and she had started to foam at the mouth.

The defendant then strangled the victim with a belt and with his hands until her breathing did stop. During all of this period of time, the victim was completely limp and unable to resist in any way.

The defendant then prepared another dosage of heroin and made Van Der Veer inject that heroin in a

large artery in the victim's groin. He then refilled the syringe and ordered Van Der Veer to inject that dosage in the victim's hand or wrist.

Shortly thereafter the defendant beat the dead victim with his hands about the face four or five times. He then took the victim off the bed and placed her body in the shower stall in the motel room where it remained for three days.

It was then placed in garbage bags and put in the trunk of an automobile and the defendant and Van Der Veer drove to Sedona, Arizona, and the next morning buried the body in a shallow grave in a remote, mountainous area near that city. Upon discovery, all that remained of the body was a skeleton with several bones missing and a hank of hair. Wild animals had located the shallow grave and eaten the body. The medical (p. 215) examiner was unable to determine the cause of death from what did remain.

The Court further finds that the aggravating circumstance set forth in subparagraph 3 that the defendant did knowingly create a grave risk of death to another person in the commission of the first degree murder, to wit: Doris Van Der Veer, does exist.

It is already noted when Doris Van Der Veer returned to the motel room on the day of the killing, she was met by the defendant with a gun in his hand which he pointed at her and with which he threatened her if she did not comply with certain orders that he gave her. The Court has no reasonable doubt that the defendant would have killed Doris Van Der Veer with that gun if she had not complied with his orders.

In Count II of the Information filed against him on February 16, 1977, the defendant was charged with the crime of Assault With a Deadly Weapon, to wit, a gun, on Doris Van Der Veer on or about the 17th to 23rd days of October, 1976. This Count was tried to the jury with Count I, the charge of Murder In The First Degree of Penelope Cheney, and the jury returned a verdict of guilty. A judgment was entered on this jury verdict, and the defendant has been sentenced for that crime. For these reasons, the defendant did knowingly (p. 216) create a grave risk of death to her during the commission of the murder of Penelope Cheney.

Mitigating Circumstances, Subsection G. The Court finds that there are no mitigating circumstances. In this regard, the Court has considered all evidence presented in the trial and in the post-trial hearings, the presentence report and all accompanying documents.

The Court has further considered all of the possible mitigating circumstances which were enumerated in subparagraph 1 through 4 of subsection G under A.R.S. 13-454, and the Court has further considered the possible mitigating circumstances set forth in subparagraph 1 through 5 of the new A.R.S. 13-703, section G.

The Court's search for mitigating circumstances has not been limited to either of these statutes but pursuant to *State v. Watson* and *Lockwood v. Ohio*, the Court has considered any possible mitigating circumstances.

It is true that the defendant was an addict and was both drinking and using narcotics on the date of the offense, but there is no credible evidence that the defendant's capacity to appreciate the wrongfulness of his

conduct or to conform his conduct to the requirements of law was significantly impaired.

The defendant is now 34 years of age. (p. 217) This is a much older age than the vast majority of criminal defendants sentenced by this Court. His age is certainly not a mitigating circumstance.

Likewise, there is no credible evidence that the defendant was under unusual and substantial duress. There is evidence that he may have had reason to be provoked and was under some stress and that he may have had motives for killing Penelope Cheney, but nothing more.

These findings of the existence of aggravating circumstances and the nonexistence of any mitigating circumstance are both made beyond a reasonable doubt.

It is dated and signed.

The Court, having found two aggravating circumstances and no mitigating circumstance, it is the sentence of the Court that on the conviction of first degree murder the defendant be sentenced to death.

We stand at recess.

* * *

---

661 P.2d 1105

STATE of Arizona, Appellee,

v.

Jimmie Wayne JEFFERS, Appellant.

No. 4253.

Supreme Court of Arizona,
En Banc.

Jan. 24, 1983.

Rehearing Denied April 5, 1983.

Stephen D. Neely, Pima County Atty. by D. Jesse Smith, Chief Deputy County Atty., Tucson, Michael Pearce (Law Student specially admitted under Rule 28(e), Rules of the Supreme Court of Arizona), for appellee.

Richard S. Oseran, Pima County Public Defender, Schotland & Stuehringer, Frank P. Leto, by Donald S. Klein and James W. Stuehringer, Tucson, for appellant.

HOLOHAN, Chief Justice.

Appellant, Jimmie Wayne Jeffers, was found guilty by a jury of first degree murder. Following an aggravation/mitigation hearing, Jeffers, was sentenced to death. He now appeals both the conviction and the sentence. We have jurisdiction pursuant to A.R.S. § 13-4031. The judgment of conviction and the sentence are affirmed.

The evidence presented at trial shows that on October 8, 1976, Jeffers was released from jail on an appeal bond following convictions of crimes unrelated to the instant appeal. About a week later he met Doris Van Der Veer at a party given by mutual friends. For the next

several weeks Doris lived with Jeffers and became his constant companion.

Doris and Jeffers registered at the Linda Vista Motel in Tucson on October 18, 1976. Jeffers had mentioned his ex-girlfriend Penelope Cheney (Penny) to Doris several times. Doris delivered a note, which Jeffers wrote, inviting Penny to the motel where Jeffers was to provide her with some heroin.

On the day of the murder Jeffers told Doris that Penny was coming over and they wished to be alone. They were going to discuss getting back together. When Penny arrived, Jeffers introduced her to Doris who then excused herself. Doris went to the motel's pool area and sat reading for about an hour and a half when it began to rain. Doris then went to her car and sat inside listening to her CB radio for about half an hour. She then returned to the motel room and knocked on the door. Jeffers admitted her, pointed a gun at her and instructed her to sit in a chair and be quiet.

Upon entering the motel room, Doris saw Penny lying unconscious on the bed. Jeffers injected a fluid into Penny's hand. He began to swear at Penny and said, "I have given her enough * * * to kill a horse and this bitch won't die." Doris noticed foam coming from Penny's mouth, which she recognized from her training as a nurse to be a sign of heroin overdose. Doris checked Penny's condition and determined that she was still alive. Doris asked Jeffers if he was going to help Penny and he responded, "No, I'm going to kill her."

Jeffers then removed the belt from around Penny's waist and began to choke her with it. He soon discarded

the belt and choked her with his bare hands. Doris urged him to stop saying she would probably die anyway, to which Jeffers replied, "No, I've seen her this way before and she's come out of it."

After the strangling Jeffers had Doris take Penny's pulse. She found no pulse and reported that Penny was dead. Jeffers then had Doris inject more heroin into Penny and choke her while he took photographs. Jeffers told Doris he did this to have proof that she was an accomplice. Jeffers struck Penny's body several times before Doris helped him put it in the shower stall, where it remained for three days. They then wrapped the body in newspaper and plastic garbage bags, placed it in a sleeping bag and transported it to a secluded spot near Sedona. There they buried it in a shallow grave.

Appellant has raised a number of issues in this challenge to his conviction and sentence. For clarity the issues have been considered in the order in which they occurred in the proceedings in the trial court.

THE JAIL NOTE

Prior to trial, Jeffers moved to suppress two documents: a handwritten note written by him, and a copy of a police report mailed to him while in the Pima County Jail. After a hearing, the court denied the motion, and the items were admitted in evidence. Jeffers contends that the court's failure to suppress this evidence violated his first, fourth, and fourteenth amendment rights.

The evidence at the suppression hearing shows that in August, 1976, before the murder in this case, Jeffers

was incarcerated in the Pima County Jail on drug offenses. Jeffers had obtained a copy of a Pima County Sheriff's Office report which stated that in June, 1976, Penny Cheney and another woman had given the sheriff's office information about Jeffer's narcotics connections and his trading drugs for stolen property. Jeffers had underlined the words "Penny Chaney [*sic*] . . . furnished the following information" and wrote beside a list of names on the report, "Patty didn't know any names" and "Penny was only one [sic] that knew this."

On August 21, 1976, Jeffers wrote a note (or "kite" as notes between prisoners are called) to one Bobby Norgard, another prisoner who was in a cell approximately 30 feet away. Jeffers testified that he folded the note two or three times, wrote "Bobby" on the outside, attached a copy of the police report, and asked a detention officer, Officer Cleburn, to deliver it to Norgard. After taking the note, Cleburn read it and turned it over to his supervisor. The note offered Norgard "some quick cash" if when he got out of jail he would get rid of Penny and "Fat Boy" (identified at trial as Richard Honton). The note read in part:

> Name your price and it will be paid the day after it is in the papers. I want to do it myself but I am not sure they will set bond. If they do it will take a couple of months. I am in a hurry. I don't want her to get out of town. An O.D. would be find. Nice & clean.

Jeffers, another prisoner, and Officer Cleburn testified at the suppression hearing. Their testimony established that the prisoners in the Pima County Jail

frequently exchanged notes with detention officers serving as messengers. Officers would usually agree to pass the notes unless they were so busy that it was inconvenient for them to go to the recipient's cell. Jeffers and the other prisoner testified that although each had sent numerous notes, neither one had ever seen any officer open or read the note.

At that time the jail had no formal written policy dealing with notes between prisoners; however, published jail rules provided that incoming United States mail was regularly opened to check for contraband. Jeffers testified that he did not expect or intend that Officer Cleburn would read the note.

Jeffers contends that the officer's reading his note was an unreasonable search which infringed his reasonable expectation of privacy in the note, and therefore concludes that his fourth amendment rights were violated and the note should have been suppressed. Prisoners do retain some fourth amendment rights even though incarcerated. *United States v. Lilly*, 576 F.2d 1240 (5th Cir.1978); *Sostre v. Preiser*, 519 F.2d 763 (2d Cir.1975); *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir.1975). Jeffers argues that because the jail had no published rules prohibiting note passing and because previous notes had been delivered intact, he reasonably expected this note to remain private.

The application of the fourth amendment depends on whether the person invoking its protection can claim a justifiable, reasonable, legitimate expectation of privacy that has been invaded by the challenged governmental action. *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61

L.Ed.2d 220 (1979); *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *United States v. Hinckley*, 672 F.2d 115 (D.C.Cir.1982).

Prison officials may inspect and examine the communications of inmates without depriving them of their constitutional rights. *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); *Denson v. United States*, 424 F.2d 329 (10th Cir.1970), *cert. denied*, 400 U.S. 844, 91 S.Ct. 88, 27 L.Ed.2d 80 (1970). When an inmate voluntarily writes a letter and gives it to a guard for delivery to another inmate, he cannot reasonably expect the letter to remain private. *State v. Matthews*, 217 Kan. 654, 538 P.2d 637 (1975); *Thomas v. State*, 39 Md.App. 217, 384 A.2d 772 (1978), *aff'd*, 285 Md. 458, 404 A.2d 257 (1979); *State v. Johnson*, 476 S.W.2d 516 (Mo.1972), *cert. denied*, 409 U.S. 859, 93 S.Ct. 144, 34 L.Ed.2d 105 (1972); *Hicks v. State*, 480 S.W.2d 357 (Ten i.Cr.App.1972); *State v. Copeland*, 15 Wash.App. 374, 549 P.2d 26 (1976). Once prison officials have a right to examine such messages, no rule requires them to close their eyes to what they discover therein. *State v. McCoy*, 270 Or. 340, 527 P.2d 725 (1974).

Appellant contends that the cases which have allowed notes from prisoners to be used by the state involved instances in which the prisons had published regulations allowing prison officials to intercept and read inter-prisoner communications. We observe, however, that *Thomas v. State, supra*, is a case in which the prison had no published rules concerning the inspection of notes passed between prisoners. The defendant in *Thomas* sought on Fourth Amendment principles to suppress the use of the contents of a note which he, as a pretrial

detainee, had sought to have delivered to a fellow prisoner. The note had been placed in a sealed envelope and handed to a detention officer for delivery, but the officer opened the envelope and read the contents.

The Court of Appeals of Maryland in its decision conceded that it could not say that the defendant knew or should have known that the envelope would be opened and its contents read. The Maryland court reasoned that merely because inmates may retain a degree of fourth amendment protection with respect to some matters, it does not necessarily follow that the defendant had a reasonable expectation of privacy in the contents of the envelope. However, even assuming that he had some justifiable expectation of privacy in the note so that the fourth amendment was involved in the search, the court found that the search was reasonable under the circumstances and the fourth amendment was not violated. As the court observed:

> Although we believe that it would be preferable for jails . . . to inform inmates, by regulation, posted notice or otherwise, concerning inspection of inmate to inmate correspondence, nevertheless, whatever privacy expectations the defendant Thomas may have had regarding the sealed envelope were outweighed by the legitimate security needs of the detention center. The absence of a regulation covering the matter does not, in our judgment, make the inspection and reading of correspondence from one inmate to another an unreasonable search under the Fourth Amendment.

Thomas v. State, 285 Md. 458, 469, 404 A.2d 257, 263, (1979).

We agree with the Maryland court's reasoning. Any jail by its very nature must be concerned with the security of its inmates and with the prevention of criminal activities within its confines.

Jeffers also argues that his first amendment rights were violated, citing *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974); *Guajardo v. Estelle*, 580 F.2d 748 (5th Cir.1978); and *Navarette v. Enomoto*, 536 F.2d 277 (9th Cir.1976), for the proposition that prisoners retain their first amendment rights. The cited cases deal with the first amendment rights of parties *outside* the prisons to receive mail from within the prison.

> While First Amendment rights of correspondents with prisoners may protect against the censoring of inmate mail, when not necessary to protect legitimate governmental interests, see *Procunier v. Martinez, [supra]*, this Court has not yet recognized First Amendment rights of prisoners in this context. [citations omitted] Furthermore, freedom from censorship is not equivalent to freedom ~~from~~ inspection or perusal.

Wolff v. McDonnell, 418 U.S. 539, 574-76, 94 S.Ct. 2963, 2984, 41 L.Ed.2d 935, 962 (1974).

We find no violation of appellant's rights in the state's use of the note attempted to be passed in the county jail.

EVIDENCE OF ESCAPE

Prior to Jeffers' October, 1976 release from jail on an appeal bond, he was convicted in state court of receiving stolen property. A 12-year prison sentence was imposed.

Jeffers was also convicted on four counts of federal firearm violations for which he received a 20-year prison sentence. In February, 1977, Jeffers was arrested and charged with the murder of Penny Cheney. While awaiting trial on the homicide charge Jeffers was kept in custody at the Pima County Jail. On September 27, 1977, Jeffers and his cellmate, Robert Butcher, escaped from jail and remained at large for approximately 24 hours before their recapture.

Prior to trial in the instant case, appellant's counsel filed a motion in limine to preclude any reference at trial by state's witnesses to appellant's escape from the Pima County Jail. The motion was denied and evidence of the escape was elicited from Jeffers on cross-examination over objection.

The law is clear that escape constitutes an exception to the general rule that evidence of a crime by the accused, entirely distinct from that for which he is on trial, is neither relevant nor admissible. *State v. White*, 101 Ariz. 164, 416 P.2d 597 (1966). The reason for this exception is that escape is a fact which may indicate a consciousness of guilt of the underlying offense and therefore, it is admissible. *State v. Wilcynski*, 111 Ariz. 533, 534 P.2d 738 *cert. denied*, 423 U.S. 873, 96 S.Ct. 141, 46 L.Ed.2d 104 (1975); *State v. White, supra*. Appellant argues that because it was possible that he escaped for reasons other than a consciousness of guilt of the murder charge, such as to avoid the combined 32-year prison sentences, the escape did not convey an unequivocal inference of consciousness of guilt. This ambiguity, he argues, renders the escape irrelevant to the murder charge.

We recognize that authority exists in other jurisdictions that "the circumstances must be such as to exclude every reasonable hypothesis except that of the defendant's guilt of the offense charged," in order for the fact of escape to be admissible at trial. *State v. Crawford*, 59 Utah 39, 201 P. 1030 (Utah 1921). *See United States v. Myers*, 550 F.2d 1036 (5th Cir.1977); *Damron v. State*, 58 Tex.Cr. 255, 125 S.W. 396 (1910). There is more recent authority which indicates that evidence of escape may be introduced in a criminal case, despite multiplicity of pending charges. *Johnson v. State*, 312 A.2d 630 (Del.Supr.1973); *State v. Guinan*, 506 S.W.2d 490 (Mo.App.1974); *State v. Hudson*, 491 S.W.2d 1 (Mo.App.1973); *Archie v. State*, 488 P.2d 622 (Cr.App.Okl., 1971); *Chapple v. State*, 528 S.W.2d 62 (Cr.App.Tex. 1975); *State v. Piche*, 71 Wash.2d 583, 430, P.2d 522 (1967), *cert. denied*, 390 U.S. 912, 88 S.Ct. 838, 19 L.Ed.2d 882.

The admissibility of evidence of an escape is not determinative of the weight to be afforded to that fact, and the accused may go forward with the evidence to explain any alternative reasons he may have had for the escape. *State v. White*, 101 Ariz. 164, 416 P.2d 597 (1966). Jeffers did not attempt to explain why he waited until his incarceration on this offense to flee from the prison terms imposed rather than run when he was released from jail nearly a year before, but he was not denied the opportunity to present an explanation.

We hold that the existence of unserved sentences or unrelated criminal charges pending at the time of the escape did not render evidence of Jeffers' escape inadmissible. Rather the existence of alternative reasons for the escape goes to the weight of the evidence and not to its admissibility. *State v. White, supra; accord, Archie v. State, supra; State v. Piche, supra*. There was no error in the trial court's admission of evidence of Jeffers' escape from the Pima County Jail.

JAIL CLOTHING

On the first day that evidence was presented to the jury, Jeffers appeared in court wearing Pima County Jail clothing. The clothing consisted of a short-sleeved blue shirt and dark blue pants. Jeffers wore civilian clothes throughout the rest of the lengthy trial.

Jeffers claims that the appearance in jail garb denied him the right to be presumed innocent, in contravention of the due process clause of the fourteenth amendment.

A state cannot compel an accused to stand trial before a jury in identifiable prison clothes. *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). In order to run afoul of the proscription in *Estelle*, Jeffers' appearance in court in jail clothes must have been *compelled* by the state against his will. *See Bentley v. Crist*, 469 F.2d 854 (9th Cir.1972). Jeffers does not deny that he was given the opportunity to wear his street clothes in court and chose not to wear them. Rather, Jeffers claims that his choice to forego donning street clothing was involuntary because he was awakened several times during the previous night by jail personnel. We cannot agree that Jeffers was so tired or sick that he was unable to make the voluntary election to appear in court wearing jail clothes. From Jeffers' own testimony we calculate that he slept well over ten hours. During this time he endured six interruptions, most of which kept him awake only

momentarily. These unfortunate interruptions fall short of coercion capable of overbearing Jeffers' will. We find no support in the record for the contention that Jeffers' choice to refuse street clothing was anything but an intentional relinquishment of a known right.

EVIDENCE OF ASSAULT

Appellant Jeffers urges that the evidence of prior bad acts was introduced to prove his character as a "bad man" in violation of rule 404(b), Arizona Rules of Evidence. He urges that the prior assaults were not sufficiently similar to the assault on Doris or the murder of Penny to show any characteristic method, plan, or scheme, and he contends that the prejudicial effect far outweighed any possible relevance this evidence might have. He cites rule 403, Arizona Rules of Evidence, 17A A.R.S.

The evidence challenged by the defense was presented by Sharon Galarza, a prosecution witness. She testified that she had received a grant of immunity from pending criminal charges against her in return for her testimony against Jeffers. She testified that she had lived with Jeffers from late 1975 to May 1976 and had met Penny Cheney during that period. Sharon, Penny, and Jeffers were all using heroin then. Sharon was arrested for selling heroin in October, 1976, and apparently released soon afterwards. On November 6, 1976, she had a telephone conversation with Jeffers in which she told him that she had thought at first that Penny had been involved in her arrest, but later found she was mistaken. She testified that Jeffers then told her, "Well, nobody has

to worry about her anymore. She's gone . . . . I killed her . . . . I just got tired of her * * * ." He said that he had proof that Penny had snitched on him. He invited Sharon to his room at the Thunderbird Motel for some heroin, adding that he was living with a woman whom he had forced to help him with the killing and that Sharon should not mention the killing to the woman because "she wouldn't appreciate if anyone knew." Sharon went to the motel, saw Jeffers, and met Doris. The next day Jeffers and the woman known as "Dirty Mary" went to Mexico to buy heroin. The woman stole Jeffers' money. Sharon telephoned Jeffers the following day, and he invited her to the motel for a share of the heroin. When she arrived, Jeffers and Doris were alone in the room. Jeffers locked the door, pulled the drapes, and assaulted Sharon, holding a large butcher knife to her throat and accusing her of ripping him off. He then forced Sharon to inject herself with a substance which she feared was poison, but was in fact heroin. At one point Sharon managed to catch Doris' eye and Doris smiled reassuringly, as if to indicate that the drug was not poisoned. On the day following this incident, Sharon saw Jeffers assault Roger Valery, accusing him of conspiring with Dirty Mary. Jeffers threw him onto a bed, held a gun between his eyes, and threatened to kill him.

Sharon also testified that during the first few days she lived with Jeffers, he told her of two prior assaults on Penny Cheney when he thought Penny had stolen some jewelry from him. Once Jeffers tried to overdose Penny, and once he chased her with an axe, chopped up a stereo, and chased her out a window.

On cross-examination, the defense attacked Sharon's character by eliciting testimony that she was a prostitute and a heroin addict and dealer. Sharon did not report what Jeffers had said and done to anyone until shortly before she was to go to trial on heroin and prostitution charges in mid-January 1977. She then told her attorney, who notified the county attorney's office. The defense questioned Sharon about why she had not come forward with this information earlier, implying that she had fabricated the story to avoid prosecution.

On redirect, Sharon testified that she did not inform the authorities immediately because "I just wanted to put it out of my head. I was scared. I didn't want to think about it." She finally told her attorney about Jeffers because she heard from a friend that "a white man with real fuzzy hair" had been looking for her, and "I thought it was Mr. Jeffers and it scared me." She related that Jeffers had beaten and choked her, held a gun to her head, and tried to overdose her while she lived with him, and that she feared reprisals if he caught up with her.

The list of "other purposes" in rule 404(b), for which other crime may be shown, is not exclusive; if evidence is relevant for any purpose other than that of showing the defendant's criminal propensities, it is admissible even though it refers to his prior bad acts. *State v. Tuell*, 112 Ariz. 340, 541 P.2d 1142 (1975); *State v. Thompson*, 110 Ariz. 165, 516 P.2d 42 (1973); *State v. Jones*, 26 Ariz.App. 68, 546 P.2d 45 (1976); *see also United States v. Barrett*, 539 F.2d 244 (1st Cir.1976). The trial judge must determine whether the probative value of the disputed evidence is outweighed by the danger of unfair prejudice; if so, the evidence should be excluded. *United States v. Longoria*,

624 F.2d 66 (9th Cir.1980); *State v. Hays*, 17 Ariz.App. 202, 496 P.2d 628 (1972). The trial judge has considerable discretion in determining whether to admit evidence of other crimes and need not explain the basis for the decision to admit such evidence. So long as the decision is supported by the facts before the court, we will affirm the trial court's decision unless a clear abuse of discretion appears. *State v. Clark*, 126 Ariz. 428, 616 P.2d 888, *cert. denied*, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980); *State v. Aguirre*, 130 Ariz. 54, 633 P.2d 1047 (App.1981).

Evidence which tests, sustains, or impeaches the credibility or character of a witness is generally admissible. *State v. Mosley*, 119 Ariz. 393, 581 P.2d 238 (1978); *State v. Torres*, 27 Ariz.App. 556, 556 P.2d 1159 (1976). In *Torres*, the defendant threatened the witness, who then corroborated his false story. The court of appeals stated that:

> [A]ppellant's prior misconduct explained [the witness'] fear of him which caused her to tell a false story. Under these circumstances, where the prior misconduct had independent relevancy for some purpose other than showing a probability that appellant committed the crime for which he was being tried, it was properly admitted. Udall, Arizona Law of Evidence, Sec. 115.

Id. at 559, 556 P.2d at 1162. We believe that the evidence of Jeffers' assaults upon Sharon and others explained the fear Doris and Sharon felt for Jeffers and their reasons for failing to report the murder at once. The evidence helps counter the defense's insinuation that Sharon had fabricated the story to gain immunity.

The evidence was relevant for the purpose of bolstering these witnesses' credibility, and we find no abuse of discretion by the trial judge in admitting the evidence despite its prejudicial nature. The jury was given a proper limiting instruction stating that evidence of other crimes could not be considered to prove Jeffers' bad character or any disposition to commit crimes. We find no error in the admission of this evidence.

PRIOR MURDER ATTEMPT UPON THE VICTIM

Appellant challenges the admission of evidence of what counsel have styled a prior murder attempt upon the victim, produced at trial in the form of the victim's hearsay statements. Edith Meck, manager of the apartments in which Jeffers lived, and Lillian Ramirez, a nurse at the Tucson Medical Center testified about contacts they had with the victim, Penny Cheney, approximately 11 months before her death. Mrs. Meck was permitted to describe to the jury an incident in which she observed Penny running from the direction of Jeffers' apartment, screaming for help. Mrs. Meck said Penny was cut on the hand and had left a trail of blood along the sidewalk where she ran. When Penny approached Mrs. Meck, she cried out that Jeffers had "doped her and threw her out the bedroom window." Mrs. Meck described Penny's condition as "very excited," and said her speech was difficult to understand. Penny's eyes "looked very funny" and she leaned on Mrs. Meck "as though she couldn't hardly stand up." Later that day Mrs. Meck observed Jeffers' bedroom window to be broken.

Soon after her encounter with Mrs. Meck, Penny was taken by ambulance to the Tucson Medical Center Emergency Room. There she met Nurse Lillian Ramirez who obtained and charted information to aid the doctor in Penny's diagnosis and treatment. Nurse Ramirez determined that Penny had sustained injuries to her right hand and left leg. The nurse testified that Penny was semi-stuporous and pale, that she had slow respiration, slurred speech, and pinpoint pupils that did not react to changes in light levels. Nurse Ramirez asked Penny what happened to her and Penny responded "that she had been drugged by her boyfriend, that friends were coming to help kill her and she had jumped [from a window] to get away." Penny refused to answer the nurse's question about what drug had been given her saying, "I don't know. I don't want him to get in trouble." Nurse Ramirez testified that Penny was eventually diagnosed and treated with narcan, which is used to counteract the effects of a narcotic on a patient.

Appellant makes three separate attacks upon the admission of the statements of Penny Cheney. First, Jeffers contends the incident constitutes a prior bad act which is inadmissible under rule 404(b), Arizona Rules of Evidence, 17A, A.R.S. Jeffers also claims the statements are hearsay, not properly admissible under any exceptions listed in rule 803. Finally, Jeffers challenges the statements' admission as a denial of his sixth amendment right to confrontation.

a. PRIOR BAD ACT

Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

We have long held that where the existence of premeditation is in issue, evidence of previous quarrels or difficulties between the accused and the victim is admissible. *Sparks v. State*, 19 Ariz. 455, 171 P. 1182 (1918); *Leonard v. State*, 17 Ariz. 293, 151 P. 947 (1915). In *Leonard* we upheld the admission of evidence of trouble between the defendant and the victim four years before the homicide there at issue. *Id.*

The admissibility of such testimony is not measured by remoteness in time. Rather, the length of time is a factor to be considered by the jury in determining the weight of the evidence. *State v. Moore*, 111 Ariz. 355, 529 P.2d 1172 (1974).

Evidence of prior trouble between the victim and the accused derives its relevance from the fact that the existence of prior ill will toward the victim not only renders the commission of the crime more probable, but tends to show the malice, motive or premeditation of the accused. *Leonard v. State, supra; State v. Denny*, 27 Ariz.App. 354, 555 P.2d 111 (1976).

Evidence of this prior bad act, taken together with the expression in Jeffers' intercepted jail note of his desire to kill Penny by heroin overdose, shows a continuing state of mind from which the jury could properly infer that Jeffers carried out his desire. *See State v. Moore, supra.*

Furthermore, Jeffers professed a deep abiding love for Penny which would not allow him to cause her any harm. The opening statement for the defense made several references to this love Jeffers had for Penny. Thus, evidence of this prior incident would also be admissible to rebut Jeffers' claim of inability to harm his loved one. *See also, State v. Denny, supra* (evidence of defendant's prior assault on homicide victim admissible to rebut claim of victim's personal abuse of defendant).

In addition to relevance, admission of prior bad act evidence requires sufficient indicia of its reliability. *State v. Gause*, 107 Ariz. 491, 489 P.2d 830 (1971), *vacated on other grounds*, 409 U.S. 815, 93 S.Ct. 192, 34 L.Ed.2d 71 (1972). In *Gause* we stated that "[a] bald expression of fear by a murder victim standing alone does not have sufficient reliability to be admitted." *Id.* at 495, 489 P.2d at 834. Penny's statements need not stand alone in reflecting their reliability to render Penny's statements admissible. The substance of the statements is that Penny went through a window somehow because Jeffers drugged her and threatened her. Her statement was corroborated by her fresh cuts, and the trail of blood and broken window. That she had been drugged was corroborated by her demeanor, appearance, and treatment with narcan. The fact that the doctor's diagnosis and Penny's refusal to reveal what drug was used because she did not "want to get [Jeffers] in trouble," lends further reliability, because

her protective attitude toward Jeffers suggests that she did not fabricate his involvement with her injury.

Jeffers argues that the discrepancy between the statements as related by the two witnesses regarding whether Penny jumped or was thrown through the window strips the statements of their reliability and renders them inadmissible. We do not agree. This discrepancy is minor and has little impact on what makes the incident relevant to Penny's murder. We hold that the statements are sufficiently reliable and relevant to be properly admissible for the purposes previously stated.

b. HEARSAY

The trial court admitted Penny's statement to Mrs. Meck under the excited utterance exception to the hearsay rule. Rule 803(2) of the Rules of Evidence defines excited utterance as "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Three requirements must be met for the proper admission of an excited utterance under this exception to the hearsay rule: (1) there must have been a startling event; (2) the statement must relate to the startling event; and (3) the statement must be made spontaneously, that is, soon enough after the event so as not to give the declarant time to fabricate. *State v. Barnes*, 124 Ariz. 586, 606 P.2d 802 (1980), *State v. Woolery*, 93 Ariz. 76, 378 P.2d 751 (1963).

Jeffers argues that the statement fails to satisfy two of the above requirements and was, therefore, improperly admitted. In that regard, Jeffers claims that the statement

related to the unreliable perceptions of a declarant under the influence of an intoxicating drug rather than the startling event itself; and secondly, that the statement lacked the requisite spontaneity.

The law is clear that this court will not reverse the trial court's ruling under the excited utterance exception to the hearsay rule absent a clear abuse of discretion. *State v. Dale*, 113 Ariz. 212, 550 P.2d 83 (1976); *State v. Kevil*, 111 Ariz. 240, 527 P.2d 285 (1974); *State v. Hughes*, 120 Ariz. 120, 584 (App.1978).

The basis for the exception is that the event produces nervous excitement making fabrication unlikely. *State v. Peeler*, 126 Ariz. 254, 614 P.2d 335 (App.1980). Our courts have not attempted to confine the application of the excited utterance exception solely to indisputably reliable statements. In *Peeler, supra*, the exception was applicable even though evidence was presented that statements made by the victim would probably be less reliable during periods of extreme agitation. Similarly, in *State v. Yee*, 121 Ariz. 398, 590 P.2d 937 (App.1979), the declarant's statements were admitted even though his wife testified that her husband was particularly unreliable when he became excited and that she distrusted the statements in question. Admission as a hearsay exception is not foreclosed by the fact that a statement's reliability has been impugned. Id.

The record leaves no room for doubt that Penny was under the influence of a narcotic drug at the time she made the statement, "He drugged me." Jeffers contends that the fact of intoxication plus the inconsistency

between Penny's two statements establish that the statements resulted from the drug's effect rather than the excitement of the startling event. Mrs. Meck testified that despite Penny's difficulty with her coordination, she appeared to be very excited, and although she was hard to understand, Penny seemed to know what she was talking about.

Jeffers would have us declare Penny's statements to be so inherently unreliable that exclusion is the only cure. This we decline to do. It is unquestionable that the use of drugs may have a deleterious effect on one's ability to perceive and communicate. *See State v. Ballesteros.* 100 Ariz. 262, 413 P.2d 739 (1966). Nevertheless, a witness is not rendered incompetent to testify merely because he was under the influence of drugs at the time of the incident about which he is testifying or at the time he testifies. *Ballesteros, supra; Wilson v. United States,* 232 U.S. 563, 34 S.Ct. 347, 58 L.Ed. 728 (1913) (witness on morphine at time testified). *See, State v. Reyes,* 99 Ariz. 257, 408 P.2d 400 (1965) (by implication); *State v. Arriola,* 99 Ariz. 332, 409 P.2d 37 (1965) (by implication). The question of reliability here, just like the question of competency, is within the sound discretion of the trial court. In both instances the question of credibility remains for submission to the jury.

We find Jeffers' argument that the statement was not made soon enough after the startling event to possess the requisite spontaneity to be without merit. Penny ran approximately two blocks from Jeffers' apartment to Mrs. Meck's office, where she made the statement in response to Mrs. Meck's question, "What happened?" Penny was still bleeding from a fresh cut that she presumably

incurred during the startling event of being drugged and going through a window. Penny remained in Mrs. Meck's office only ten to fifteen minutes before an ambulance arrived. The totality of the circumstances indicate that Penny was under the stress and excitement caused by the startling event when she made the statement. *See generally State v. Barnes, supra; State v. Morrow,* 108 Ariz. 108, 493 P.2d 119 (1072); *State v. Perry,* 116 Ariz. 40, 567 P.2d 786 (App.1977). The trial court did not err in admitting it.

The trial court admitted Penny's statement to Nurse Ramirez under the medical diagnosis exception to the hearsay rule. Jeffers maintains that this was error.

Rule 803 excepts from the hearsay rule statements made for purposes of medical diagnosis or treatment. Subsection 4 of the rule defines such statements. It provides:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause of external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Arizona's adoption of this rule verbatim from the federal rule significantly broadened the scope of admissible patient to physician hearsay statements. Udall and Livermore, Arizona Practice: Law of Evidence, § 129 (2d ed. 1982) (hereinafter, Udall).

Two important factors derive from the rule's rationale: (1) whether the declarant's motive is consistent with receiving medical care; and (2) whether it is reasonable for the physician to rely on the information in diagnosis or treatment. *United States v. Iron Shell,* 633 F.2d 77 (8th

Cir.1980). Thus in *Iron Shell*, the court admitted an assault victim's statements to her doctor stating: "It is important to note that the statements concern what happened rather than who assaulted her. The former in most cases is pertinent to diagnosis and treatment while the latter would seldom, if ever, be sufficiently related." *Id.* at 84. *Accord, United States v. Nick*, 604 F.2d 1199 (9th Cir.1979). The Advisory Committee's Note to rule 803(4) also makes a point of illustrating that statements as to fault would not ordinarily qualify under the exception.

In the instant case Nurse Ramirez testified that who administered the narcotic was not reasonably pertinent to diagnosis or treatment. Furthermore, Penny's motive to provide information for treatment must be regarded with suspicion because of her refusal to name the drug used on her. Penny's statement fails to satisfy either prong of the test and should not have been admitted into evidence under the medical diagnosis exception to the hearsay rule.

The state urges other grounds for the statement's admission; excited utterance, expression of present state of mind, or expression of fear by a murder victim. We find none of these to except Penny's statement to Nurse Ramirez from the hearsay rule. First, Penny's reflective capabilities, as illustrated by her refusal to disclose what drug was used, remove the statement from the excited utterance category because the declarant's ability to fabricate is apparent. Secondly, we perceive no significant difference between an expression of fear by a murder victim and an expression of state of mind under rule 803(3). Both exceptions require that the statement show some state of mind which is relevant to the issues

involved in the criminal proceeding. *See State v. Ramirez*, 116 Ariz. 259, 569 P.2d 201 (1977); *State v. Gause*, 107 Ariz. 491, 489 P.2d 830 (1971), *vacated on other grounds*, 409 U.S. 815, 93 S.Ct. 192, 34 L.Ed.2d 71 (1972). Penny's state of mind at that remote date would be of questionable relevance to any issues at trial. Thus, admission under the state of mind exception would not have been proper.

Although we find error in the admission of the second statement, we conclude that such error was harmless. The statement indicated that Penny was drugged by Jeffers, its content was the same as that of the properly admitted statement to Mrs. Meck. This repetition, although error, was not prejudicial. *State v. Woolery*, 93 Ariz. 76, 378 P.2d 751 (1963). The second part of the statement to Nurse Ramirez to the effect that Penny jumped from the window to get away from friends that were coming to kill her, does not incriminate Jeffers and is not prejudicial. If anything, the contradiction between this statement and the first had the potential to benefit Jeffers' case.

c. RIGHT TO CONFRONTATION

Appellant asserts that introduction into evidence of Penny's hearsay statements denied him the right to confrontation guaranteed by the sixth amendment and made applicable to the states through the fourteenth amendment. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). A literal reading of the confrontation clause would require the exclusion of any statement, however relevant, made by a declarant who was, for any reason, absent from trial. Such a reading has long been

rejected as unintended and too extreme. *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

The primary concern of the confrontation clause is to assure that the jury has an adequate basis upon which to evaluate the truth of the statement. *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). Cross-examination, although preferred, is not the sole method by which the confrontation clause may be satisfied. Absent cross-examination, the essential issue is whether under all of the circumstances, the hearsay statement has a high degree of reliability. *United States v. Nick*, 604 F.2d 1199 (9th Cir.1979).

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." *Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.* In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. (emphasis added) *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597, 607 (1980).

There is little doubt that the excited utterance qualifies as a firmly rooted hearsay exception, *see* 6 Wigmore, Evidence § 1746 (Chadbourn rev. 1976), and generally any evidence that falls within such an exception would for that reason alone satisfy the reliability requirement. In addition, much of what Penny stated was corroborated by independent evidence. The appellant's right to confrontation was not violated.

NEGATIVE EVIDENCE

Central to Jeffers' defense was his testimony that he was not present when Penny Cheney died, but was at or en route from Danny's Hideaway Bar in South Tucson at the time. In that regard Jeffers testified as follows. Penny Cheney arrived at the motel room in which Jeffers and Doris Van Der Veer had been living at approximately 11:00 A.M. on the day she died. At Jeffers' request Doris left immediately and did not return until between 1:00 and 2:00 that afternoon. The three of them remained in the motel room for 30 to 45 minutes when Jeffers left to attempt to purchase some heroin. Jeffers went to Danny's Hideaway, which is about a 30-minute drive from the motel. After spending a few hours in the bar, Jeffers met a man who agreed to help him in the purchase of heroin. He accompanied this man out of Danny's Hideaway at 5:30 or 6:00 that evening. Upon his return to the motel room at 7:00 P.M., Jeffers discovered Penny Cheney, already dead, lying on the bed and Doris Van Der Veer sitting quietly in a chair nearby. In sum, Jeffers' testimony places his arrival at Danny's Hideaway no earlier than 2:00 and as late as 3:15 on October 21, 1976.

In order to rebut Jeffers; testimony, the state called Sharon Galarza to stand to testify that she was in Danny's Hideaway on October 21, 1976 from about 12:30 P.M. to sometime between 2:30 P.M. and 3:00 p.m. Galarza testified that she knew Jeffers at the time but she did not see him at Danny's that day. She testified that she remembered that day because it was the day she was arrested on a sale of narcotics charge.

Jeffers challenges the trial court's admission over objection of Galarza's rebuttal testimony in that it constituted negative evidence which lacked sufficient foundation to give it probative value.

The acceptance or rejection of negative evidence is largely a matter of discretion for the trial court. *State v. Kelly*, 111 Ariz. 181, 526 P.2d 720 (1974). The general rule is that negative evidence to the effect that the witness did not see an event occur can rise to the level of probative value only when supported by a sufficient foundation that the witness' position and attitude were such that he probably would have seen the event had it happened. *Byars v. Arizona Public Service Co.*, 24 Ariz.App. 420, 539 P.2d 534 (1975).

Galarza's testimony concerning her observations of October 21, 1976, if believed, establishes that Jeffers was not at Danny's Hideaway between 12:30 and 2:30 or 3:00 P.M. The testimony indicates that Jeffers was not at the establishment before approximately 3:00 P.M., and it was admissible for that purpose. The appellant could have been at the bar at a later hour, and this is what the defense argued. We find no error in the admission of the evidence.

EXCLUSION OF CONVERSATION

The defense called as a witness Myron McRoberts, a painter who had stayed at the Linda Vista Motel the week of the murder. He testified that on the afternoon of the murder, he saw Doris and a blonde woman leave the motel together in a dark-colored car. He said he remembered the day because it was raining so that he couldn't

work, because he and his partner folded their dropcloths behind the motel contrary to their usual practice, because he had gone out drinking the night before and was somewhat hungover, and because he remembered a conversation he had had with Mrs. Wheeler, the manager of the motel. The state objected to the introduction of the content of the conversation on hearsay grounds, and the objection was sustained. The defense offered to prove that Mrs. Wheeler had told McRoberts, "There's a cute blonde in room 7," and that was one reason he identified the particular date.

Appellant contends that the statement was admissible nonhearsay in that the statement was offered not for the truth of the matter asserted, but to show how McRoberts' remembered the day in question. Since the evidence was offered only to prove that the statement had been made, it was not hearsay. *State v. Johnson*, 106 Ariz. 539, 479 P.2d 424 (1971). The trial court should have allowed the offered testimony.

The error by the trial court is not reversible because the excluded evidence was cumulative. The witness had already described several reasons why he remembered the day, and the excluded testimony merely added an additional reason for remembering the day.

EXCLUSION OF PRIOR CONSISTENT STATEMENTS

Jeffers contends that certain statements of defense witnesses were improperly excluded as hearsay. Three statements are involved; the first was allegedly made by Jeffers to his mother in a telephone call on November 7,

1976, shortly after the murder, to the effect that Penny was dead and that she had overdosed. The defense attempted to introduce this statement through the testimony of Jeffers and of his mother, but hearsay objections were sustained as to both. The second and third statements were allegedly made to William Heuisler, a private investigator, by Myron McRoberts and Dave Birket, respectively, when he first spoke with them about their recollection of the events at the motel. In answer to Heuisler's question whether he remembered anyone from around the motel, McRoberts reportedly stated that he saw a "good-looking blonde" and Birket said he remembered seeing another girl there with tattoos. The defense attempted to introduce these statements through Heuisler's testimony, but the court sustained hearsay objections.

Jeffers argues that the statements were not hearsay because they were prior statements consistent with the declarants' testimony at trial and were offered to rebut express or implied charges of recent fabrication. Rule 801(d)(1)(B), Rules of Evidence, 17A A.R.S., *Ray Korte Chevrolet v. Simmons*, 117 Ariz. 202, 571 P.2d 699 (App. 1977).

The state points out that the declarants were never impeached upon the particular matters asserted in the prior statements. Thus, because the prior statements did not rebut the alleged fabrications or memory lapses, those statements were not admissible under rule 801(d)(1)(B). *See: People v. Mullin*, 197 Cal.App.2d 479, 17 Cal.Rptr. 516 (1961); *State v. Fleming*, 354 Mo. 31, 188 S.W.2d 12 (1945). Jeffers' statement that Penny was dead and had overdosed did not rebut the alleged fabrication

that Jeffers had not been involved in her death. McRoberts' testimony was not attacked on the question of whether he had ever seen a good-looking blonde around the motel, nor was Birket's testimony attacked on whether he had ever seen a tattooed woman; rather, the challenges were to their recall of the date and circumstances when they saw the women and the accuracy of their identifications.

With respect to Jeffers' alleged statement, the state urges that because the murder had already occurred when he made the statement, his motive to fabricate had already arisen. Therefore, the statement is inadmissible. *United States v. Greene*, 497 F.2d 1068 (7th Cir.1974), *cert. denied*, 420 U.S. 909, 95 S.Ct. 829, 42 L.Ed.2d 839 (1975); *People v. White*, 57 App.Div. 699, 393 N.Y.S.2d 615 (1977). The state also contends that the trial judge was within his discretion to exclude the statement as self-serving, because such statements lack trustworthiness. *State v. Duffy*, 124 Ariz. 267, 603 P.2d 538 (App.1979).

As to Jeffers' statement, we hold that the trial judge properly excluded it. As for McRoberts' and Birket's statements, we agree that the statements were not in rebuttal of any prior challenged testimony and were properly excluded as hearsay.

IMMUNITY FOR DEFENSE WITNESS

Defense counsel moved at trial for a grant of immunity to a defense witness, Mr. Louie Rosso. The motion was denied. The defense called Rosso to testify at trial, but Rosso claimed his fifth amendment privilege against self-incrimination and refused to answer any questions

pertaining to Jeffers or Doris. In their motion for new trial and in the briefs, defense counsel alleged that if Rosso had been granted immunity, he would have contradicted Doris' testimony that shortly before the murder she and Jeffers had purchased such a large quantity of heroin from Rosso that Jeffers would not have had to replenish his supply on the day of the murder. Thus, Jeffers argues that Rosso would have corroborated Jeffers' alibi testimony that on the afternoon Penny Cheney died, Jeffers had left the motel to attempt to buy heroin at Danny's Bar. He also urges that Rosso would have attacked Doris' credibility as a witness in other particulars.

Appellant concedes that this court has repeatedly held that due process does not require that immunity be granted to defense witnesses at the defense's request and that it is a matter for prosecutorial discretion to decide when the public interest would be best served by a grant of immunity. *State v. Verdugo*, 124 Ariz. 91, 602 P.2d 472 (1979); *State v. Swinburne*, 116 Ariz. 403, 569 P.2d 833 (1977); *State v. Buchanan*, 110 Ariz. 285, 518 P.2d 108 (1974). Nevertheless, he urges that these cases are not controlling because they did not deal with claimed sixth amendment violations.

Appellant contends that the court's failure to grant Rosso immunity denied him his sixth amendment right to compel the testimony of witnesses on his behalf and his rights to due process and a fair trial. He cites and relies heavily upon *Government of the Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir.1980) and *State v. Broady*, 41 Ohio App.2d 17, 321 N.E.2d 890 (1974). At the outset, we find that *Broady* is inapplicable to the case at bar, because the Ohio

statute did not require that immunity could be granted only on the application of the prosecutor.

We decline to follow the Third Circuit's lead in the *Virgin Islands* case. A.R.S. § 13-1804, now § 13-4064, explicitly provides that immunity is to be granted at the prosecuting attorney's request and does not authorize the court to grant immunity on its own motion. Additionally, we note that the *Virgin Islands* case is distinctly in the minority. *See, e.g., United States v. Herbst*, 641 F.2d 1161 (5th Cir.1981), and cases cited therein at 1168; *United States v. Turkish*, 623 F.2d 769 (2d Cir.1980), and cases cited therein at 772-74. Even the Third Circuit's opinion is divided on this question. *Cf. United States v. Rocco*, 587 F.2d 144 (3d Cir.1978). As for Jeffers' sixth amendment claims, we agree with the Second Circuit's reasoning in *Turkish, supra* at 774:

> [T]he Sixth Amendment's Compulsory Process Clause gives the defendant the right to bring his witness to court and have the witness's non-privileged testimony heard, but does nor [*sic*] carry with it the additional right to displace a proper claim of privilege, including the privilege against self-incrimination. [citations omitted] While the prosecutor may not prevent or discourage a defense witness from testifying, [citations omitted], it is difficult to see how the Sixth Amendment of its own force places upon either the prosecutor or the court any affirmative obligation to secure testimony from a defense witness by replacing the protection of the self-incrimination privilege with a grant of use immunity.

Rosso's evidence would not have provided Jeffers with an effective alibi; at best, it would have helped

corroborate his explanation for his alibi. It hardly rises to the level of the evidence in the *Virgin Islands* case, in which the witness inculpated himself. We find that Jeffers' contentions on this issue are without merit.

The appellant also claims error by the trial court in failing to give defendant's requested instruction that the defense unlike the prosecution was powerless to grant any witness immunity in order to assure their testimony.

Appellant has failed to cite any authority which would require the court to give such an instruction. The jury was aware during trial and from closing arguments that the prosecution alone presented the testimony of immunized witnesses. The defense stated in closing argument that they had been unable to present the testimony of the alleged alibi witness who Jeffers stated he saw at Danny's Bar at the time of the murder:

> No one in the world wishes more than I, except maybe Mr. Jeffers, that we could have had that person in here that sold him that heroin in Danny's on October 21st. I would have given anything. I would have stopped practicing law to have that man in here and I like to practice law, but we didn't and we couldn't, but we tried.
>
> How likely do you think it is that someone out at Danny's, in the business of selling heroin, is going to talk to the defense and come in here in front of a jury and tell you, "I did it." And subject himself to criminal prosecution. Unlikely and improbable. TR 19-125.

The defense repeatedly attacked the immunized witnesses, arguing that they fabricated their testimony to escape criminal prosecution. We find that the defense was

allowed to make its point repeatedly and that this argument, the questions asked at trial and the standard credibility instruction combined to give Jeffers a fair opportunity to present his theory of the case. We find no error in the failure of the trial court to give appellant's instruction on immunity.

INSTRUCTION DEFINING POISON

Appellant contends that the trial court erred in instructing the jury that "Murder by means of poison is . . . first-degree murder" and that "The word 'poison' means any substance introduced into the body by any means which by its chemical action is capable of causing death." (Jury Instructions Nos. 9, 11). He argues that heroin is not a "poison" under the definition in *United American Life Ins. Co. v. Beadel*, 13 Ariz. App. 196, 199, 475 P.2d 288, 291 (1970), namely, "any substance having an *inherent* deleterious property which renders it, when taken into the system, as capable of destroying life." [emphasis in original]. Thus, he concludes, the instructions were not justified by the evidence presented and hence were prejudicial error. *State v. Williams*, 120 Ariz. 600, 587 P.2d 1177 (1978); *State v. Heath*, 122 Ariz. 36, 592 P.2d 1302 (1979).

We find no merit in this argument. The *Beadel* case, *supra*, dealt with civil matters involving insurance coverage and is not controlling on this issue. In *Beadel* the court recognized the conflict in authority as to whether the term "poison" is limited to substances which are "inherently" toxic, or whether it includes all ingested substances which are "toxic in fact." In this civil case, the

court of appeals, acting from common principles of contractual construction and insurance law, resolved this ambiguity by explicitly invoking "the rule to construe undefined terms against the insurer" that drafted the policy. *Id.* at 200, 475 P.2d at 292. In this criminal case, we are not constrained by such presumptive rules of construction, and are free to make a more neutral examination of this issue. We find the jury instruction given in the court below reflects the better definition of poison in criminal cases. More specifically, there is substantial authority that heroin is considered a poison in the criminal context. *Tidd v. Skinner,* 225 N.Y. 422, 122 N.E. 247, 3 A.L.R. 1145 (1919); *Napier v. State,* 357 So.2d 1001 (Ala.App.1977), *rev'd on other grounds,* 357 Mich.App. 192, 194 N.W.2d 560 (1971); *People v. Cruciani,* 70 Misc.2d 528, 334 N.Y.S.2d 515 (1972). The evidence was in conflict whether the victim died of a heroin overdose or by strangulation. The defense theory was that Penny died of an overdose either self-administered or administered by persons other than the defendant. The prosecution's theory was that Jeffers administered the heroin. Thus the evidence presented justified the instructions and there was no error.

NEWLY DISCOVERED EVIDENCE

Following his conviction, Jeffers came into contact with Stanford A. Lewis, a fellow inmate at the Pima County Jail. Lewis agreed to testify that he saw Jeffers in Danny's Bar sometime in October, 1976. Jeffers filed a motion to vacate judgment on the basis of this newly discovered evidence. At the evidentiary hearing Lewis was unable to narrow down the date on which he had

seen Jeffers beyond that it was during the last two weeks of October. Other testimony indicated that Lewis had first told investigators that it was definitely before October 17 and as early as October 10, 1976, when he saw Jeffers in the bar. Jeffers claims Lewis might have seen him in Danny's Bar on the day of the murder, October 21, 1976. The trial court denied the motion to vacate. Jeffers claims this was error.

Jeffers also filed a petition for post-conviction relief on the ground of newly discovered evidence. That evidence included a statement by Charles Van Der Veer, Doris' husband, that he had heard Doris say she choked Penny Cheney and injected her with heroin. Charles was also present with Doris and Sharon Galarza at a meeting that had not been mentioned at trial. The "new" evidence also included a statement that Ramona Epling was aware of information that she did not testify about and that part of her testimony was false. The court denied the petition without granting an evidentiary hearing on the matter. Jeffers claims this was error and that dismissing the petition without hearing denied him the right to a hearing on his claim.

In order for relief to be granted because of newly discovered evidence, the material introduced would have to satisfy five requirements: (1) it must truly be newly discovered, i.e., discovered after the trial; (2) the record must contain facts from which the court can infer due diligence; (3) the evidence must not be merely cumulative or impeaching; (4) it must be material to the issues involved; and (5) it must be evidence that would *probably* change the verdict if a new trial was ordered. *State v. Austin,* 124 Ariz. 231, 603 P.2d 502 (1979), *cert. denied,* 446

U.S. 911, 100 S.Ct. 1841, 64 L.Ed.2d 264 (1980); *State v. Urry*, 104 Ariz. 244, 450 P.2d 1018 (1980); Rules 24.2 a(2), 32.1, Arizona Rules of Criminal Procedure, 17 A.R.S. A trial court in granting or denying a motion for new trial is accorded broad discretion. The trial court's ruling will not be reversed unless an abuse of discretion affirmatively appears. *State v. Salinas*, 129 Ariz. 364, 631 P.2d 519 (1981); *State v. Jones*, 125 Ariz. 417, 610 P.2d 51 (1980). Further, the witness who is expected to testify must appear to the trial court to be credible. Lewis' credibility is for the judge hearing the motion to determine. *State v. Salinas, supra.*

The trial court found that the testimony of Stanford Lewis did not warrant a new trial. More is required to warrant a new trial than mere conjecture or a possibility that the proffered testimony would affect the verdict. *State v. Austin, supra.* We do not believe that Lewis' inconclusive testimony satisfied the requirement that the new evidence would probably have changed the verdict. Furthermore, the motion was properly denied if Lewis' testimony was not credible to the trial court. *State v. Hughes*, 13 Ariz.App. 391, 477 P.2d 265 (1970). We find no abuse of discretion in the denial of Jeffers' motion for new trial based on the testimony of Stanford Lewis.

The trial court also did not err in denying Jeffers' petition for post-conviction relief. It has long been settled that where a defendant knows of the existence and identity of a witness before trial and makes no effort to obtain the witness' testimony, such testimony will not ordinarily justify a new trial. *State v. Salinas, supra; State v. Yanich*, 110 Ariz. 172, 516 P.2d 308 (1973). The existence and identity of Charles Van Der Veer and his relationship to

Doris were well known by the defense in this case long before trial. The statement of Charles concerned statements made by Doris which had been covered at trial. There is also considerable doubt of Charles' reliability as a witness when he waited such a long time to make his statement. The record supports the ruling of the trial judge.

Ramona Epling was a witness at trial and was subjected to vigorous cross-examination. The jury was presented with matters which may have caused them to question her testimony. Evidence concerning information she possessed, but about which she was never asked, is hardly newly discovered. *See State v. Ford*, 108 Ariz. 404, 499 P.2d 699 (1972), *cert. denied*, 409 U.S. 1128, 93 S.Ct. 950, 35 L.Ed.2d 261 (1973).

Jeffers argues that he was denied the right to subpoena witnesses because the trial court refused to grant an evidentiary hearing. In order to be entitled to a hearing the proponent must present the court with a colorable claim. To be a colorable claim, the offering must appear to be valid; that is, "if the defendant's allegations are taken as true, would they change the verdict?" *State v. Richmond*, 114 Ariz. 186, 194, 560 P.2d 41, 49 (1976).

Here, the trial court found that even if Jeffers' "new" evidence was taken as true, a new trial would not be justified. We agree with the trial court that the evidence is merely impeaching and that it was far from probable that the evidence would cause a different result. We further hold that it was not newly discovered.

RESENTENCING BY TRIAL JUDGE

On April 14, 1978, the Honorable Ben C. Birdsall sentenced appellant to death for the crime of first degree murder. While the appeal of the conviction and sentence were pending before the Court, the entire matter was remanded for sentencing in accordance with *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979).

Appellant was again sentenced to death. He raises several additional issues on appeal of his resentencing.

Appellant contends that the resentencing by Judge Birdsall, the trial judge, denied him his constitutional right to a fair and impartial tribunal. Prior to the resentencing, a hearing was conducted by Judge Robert O. Roylston to determine whether the trial judge should conduct the resentencing. Evidence adduced at the hearing showed the trial judge had been the target of a scheme involving the receipt of unsolicited goods from several mail order firms. The judge reported these activities to the postal authorities in order to get the mailings stopped. Appellant admitted sending these mailings to the judge, however, he was never charged with any crime in connection with these mailings. Additional evidence indicated that Judge Birdsall was annoyed at the matter and wanted it stopped, but that he treated it "pretty much as a joke." Judge Roylston found there were not sufficient grounds for finding bias or prejudice; appellant's motion for change of judge was denied.

We do not find a violation of appellant's right to a fair and impartial tribunal at every stage of the proceeding. He received a fair hearing on the matter. The burden

of proof was on appellant as he was the party alleging the bias or prejudice. *State ex rel. Riley v. Collins*, 7 Ariz.App. 36, 435 P.2d 871 (1968). He failed to meet this burden.

Additionally, we agree with the court of appeals when they stated:

> [W]here a party acts deliberately and with an ulterior motive in such a way as to cause the judge to become biased and prejudiced against that party, he is not entitled to have the judge disqualified. *Ponder v. Davis*, 233 N.C. 699, 65 S.E.2d 356 (1951); *In Re Union Leader Corporation*, 292 F.2d 381 (1st Cir.), *cert den'd*. 368 U.S. 927, 82 S.Ct. 361, 7 L.Ed.2d 190 (1961).

Smith v. Smith, 115 Ariz. 299, 303, 564 P.2d 1266, 1270 (App.1977).

This kind of conduct should not be rewarded. Furthermore, appellant has not shown how this alleged bias or prejudice operated to his detriment. This court will search the record and make an independent determination whether the death penalty should be imposed. *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977). This we have done and have found no error in the sentence imposed by the trial judge. Appellant has not received a harsher sentence than that received in the original sentencing.

AGGRAVATING CIRCUMSTANCES

The state bears the burden of proving the existence of aggravating circumstances beyond a reasonable doubt. A.R.S. § 13-703(C); *State v. Jordan*, 126 Ariz. 283, 614 P.2d

825 (1980). In death penalty cases this court independently reviews the facts that the trial court found established the presence or absence of aggravating and mitigating circumstances, and we determine for ourselves if the latter outweigh the former when we find both to be present. *State v. Blazak*, 114 Ariz. 199, 560 P.2d 54 (1977); *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976).

The trial court found that the evidence established two of the statutory aggravating circumstances: A.R.S. § 13-703(F)(3) and (6).

A.R.S. § 13-703(F)(3) provides that the sentencing court must consider it an aggravating circumstance if "[i]n the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense." Appellant contends that this subsection refers to indiscriminate attacks in which the murderous act itself puts others in a danger zone, such as bombing an inhabited building or firing a gun into a crowd. He points out that in all Arizona cases to date which have affirmed the existence of this aggravating circumstance, the murderous attack has itself injured another person or persons in addition to the victim of the offense. *See State v. Doss*, 116 Ariz. 156, 568 P.2d 1054 (1977) (gunshots in crowded college gymnasium killed victim and wounded a bystander); *State v. Blazak*, 114 Ariz. 199, 560 P.2d 54 (1977) (gunshots in crowded bar killed two victims and wounded another); *cf. State v. Clark*, 126 Ariz. 428, 616 P.2d 888 (1980) (this aggravating circumstance not found in quadruple murder case because evidence indicated that allegedly endangered victim was in another room, thus outside the "zone of danger" created by murderer's gunshots).

The person found to be the object of the grave risk of death was Doris Van Der Veer. Doris testified that appellant pointed a gun at her when she returned to the motel room and found Penny Cheney lying on the bed unconscious. Based upon this evidence, the jury found appellant guilty of assault with a deadly weapon. The trial judge also used this evidence to support the finding that appellant created a grave risk of death to Doris, stating, "The Court has no reasonable doubt that the defendant would have killed Doris Van Der Veer with that gun if she had not complied with his orders."

Despite the finding of the trial judge we do not believe that the evidence brings this situation within the orbit of what was intended by A.R.S. § 13-703(F)(3). The pointing of a gun at Doris was sufficient to support a conviction for assault with a deadly weapon, but the act is not sufficient to satisfy the requirements of this particular aggravating circumstance.

The peculiar facts of this case show, according to Doris' testimony, that the defendant put the gun down after the initial confrontation with her, and he proceeded with his program of killing the victim. Doris was required to remain quiet and submissive to Jeffers' direction, but it appears that he never actually intended to harm her. It would stretch the statute to extreme length to hold that this activity was within A.R.S. § 13-703(F)(3). We do not believe that the finding of the trial judge was correct on this issue.

A.R.S. § 13-703(F)(6) provides that it is an aggravating circumstance if the defendant "committed the

offense in an especially heinous, cruel, or depraved manner." This Court has applied this provision of our death penalty statute by looking to the dictionary definitions of the words used. *State v. Knapp*, 114 Ariz. 531, 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978). The element of cruelty involves the pain and the mental and physical distress visited upon the victims. Heinous and depraved involve the mental state and attitude of the perpetrator as reflected in his words and actions. *State v. Ceja*, 126 Ariz. 35, 612 P.2d 491 (1980). "Heinous" means "hatefully or shockingly evil; grossly bad"; "cruel" means "disposed to inflict pain esp. in a wanton, insensate or vindictive manner; sadistic"; and "depraved" means "marked by debasement, corruption, perversion or deterioration." *State v. Madsen*, 125 Ariz. 346, 609 P.2d 1046 (1980); *State v. Knapp, supra.*

The sentencing judge found that this aggravating circumstance existed, stating that "The defendant committed the offense of first degree murder in an especially heinous, cruel and depraved manner." We must independently determine whether the state proved any one of these elements beyond a reasonable doubt.

We find that the element of cruelty was not proven. There was no evidence that the victim suffered any pain. It appears from the record that after the injection of heroin the victim lost consciousness and never regained it before she died. Therefore, the victim experienced no pain or mental suffering and the murder was not "cruel" for purposes of A.R.S. § 13-703(F)(6).

The sentencing judge apparently based his finding that the murder was "especially heinous . . . and

depraved" on Doris' testimony that appellant strangled the victim while she was totally unable to resist, beat the dead victim about the face and reviled her, dragged the body to the shower stall where it remained for three days, and then wrapped the body in garbage bags and buried it in a shallow grave in a remote area, where wild animals unearthed and devoured the body. In other words, the judge's findings were largely based upon acts which occurred after the victim's death.

Appellant states that the heinous or depraved nature of the crime is determined by the killer's state of mind at or near the time of the offense. *State v. Lujan*, 124 Ariz. 365, 604 P.2d 629 (1979). From this he argues that events surrounding the disposition of the corpse, occurring as they did several days after the killing or even later, cannot be considered in determining whether the crime was heinous or depraved. *See State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322 (1979). We are unwilling to lay down any *per se* rule concerning how near the time of the offense the aggravating acts must take place, because we can imagine hypothetical situations in which a murderer's actions toward the victim's body long after the death could shed light on what the killer's state of mind was when the killing was done. But we are certain that courts may consider the murderer's acts after the victim's death in determining if this aggravating factor exists. *See State v. Ceja*, 126 Ariz. 35, 612 P.2d 491 (1980); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977) (defendant killed six people and sexually attacked the three female victims after their deaths; court found depravity).

However, we find that we need not decide whether the appellant's disposing of the victim's body was too

long after the commission of the murder to be considered as an aggravating circumstance, because we believe the events surrounding the murder itself support the trial court's finding that the murder was "especially heinous . . . and depraved."

We recently delineated factors to consider in determining whether the offense was committed in a heinous or depraved manner. *State v. Gretzler*, 659 P.2d 1 (1983). One factor we should consider is the infliction of gratuitous violence on the victim. In *State v. Ceja*, *supra*, the defendant robbed a woman and her husband and shot the couple to death. He continued shooting the victims when it was apparent that they had already been fatally wounded. He then repeatedly kicked the male victim in the face, although the victim was already unconscious or dead. We concluded that this additional gratuitous violence distinguished the murders from the "usual or the norm" of first degree murders and upheld the trial court's finding of heinous and depraved. In the instant case the defendant climbed on top of the dead victim and hit her in the face several times which eventually resulted in additional wounds and bleeding.

Another factor in *Gretzler* is the apparent relish with which the defendant commits the murder. In *State v. Bishop*, 127 Ariz. 531, 622 P.2d 478 (1980), we found the murder was committed in an especially heinous and depraved manner where the defendant killed the victim by striking him repeatedly with a hammer, then tied him up, caused him to fall down a mine shaft and threw rocks on top of him while he was still alive. As the defendant left the scene he turned to his victim and waived saying, "Goodbye, Norman, I hope we never see you again." 127

Ariz. at 534, 622 P.2d at 481. In the case at bar while Jeffers was beating the victim he called her "a bitch and a dirty snitch" and with each striking blow said, "This one is for so and so. [naming several names]." This evidences the relish with which appellant committed the murder. In light of these prior decisions and the *Gretzler* considerations, we find that the remarks made by appellant, while at the same time beating his victim, establish that the offense was committed in an especially heinous and depraved manner.

In addition appellant urges that § 13-703(F)(6) as construed and applied by this court, is unconstitutional as overly broad. We have addressed the constitutionality of § (F)(6) on numerous occasions. Each element – cruel, heinous, and depraved – has been narrowly defined and construed. This issue was discussed at length in *State v. Gretzler*, *supra*, and found to meet constitutional standards.

Appellant, citing *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), contends our statute is overboard because it is read in the disjunctive -- cruel, heinous, *or* depraved. We disagree with appellant that our statute becomes unconstitutional merely because we choose to read it in the disjunctive, while Georgia does not. The thrust of appellant's argument is that the disjunctive reading of § (F)(6) would allow an arbitrary imposition of death penalty since § (F)(6) could apply to any murder. A review of Arizona case law shows this is not true. We have been insistent that the murder be *especially* cruel or *especially* depraved before this section would apply. We have clearly defined the terms an have delineated factors to guide us in determining if the crime

was indeed committed in such a manner. *State v. Gretzler, supra.*

Further the case law reveals that § (F)(6) is not applicable to any and all murders, this court has narrowly limited its applicability to cases which stand apart from the norm. *State v. Gretzler, supra, State v. Ceja,* 126 Ariz. 35, 612 P.2d 491 (1980).

MITIGATING FACTORS

Another contention appellant makes is that the trial court erred in not considering factors in mitigation as well as not finding that such mitigation was sufficiently substantial to call for leniency. The court, urges appellant, should have found as mitigation that he was under the influence of heroin at the time of the murder and that this drug intoxication markedly impaired appellant's mental state at the time.

There is no evidence to contradict the fact that appellant had ingested heroin on the day of the murder. While intoxication is not a defense, a jury may consider the effects of voluntary intoxication upon an accused's culpable mental state. A.R.S. § 13-503; *State v. Laffoon,* 125 Ariz. 484, 610 P.2d 1045 (1980). However, wholly voluntary acts of a defendant will not excuse his subsequent criminal conduct. *State v. Cooper,* 111 Ariz. 332, 529 P.2d 231 (1974). The record shows the trial court did consider appellant's drug intoxication along with testimony by psychiatrists for appellant and the state. Dr. Gurland, a defense psychiatrist, testified that heroin has the effect of calming people down. Other evidence showed that long-term heroin users like appellant develop a tolerance to the effect of

the drug. Doris Van Der Veer testified that appellant had not used an excessive amount of heroin, by appellant's standards, on the day of the murder. The court found that while appellant was drinking and using narcotics the day of the murder there was no credible evidence of any significant impairment of his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. After reviewing the record we agree with the trial court's findings.

As further mitigation appellant contends his stormy love-hate relationship with victim raised the classic provocation situation and the crime was induced by the heat of passion. There is nothing in the record which indicates there was an argument or that the crime was induced by heat of passion. Appellant did learn that the victim may have been an informant against him, but this knowledge was gained in late July or early August 1976, months before the October 21 murder. About a week before the killing appellant met with the victim and discussed the possibility that she had been an informant against him. There he also was advised that the victim was now a prostitute and would charge for her sexual favors. Appellant testifies that he accepted the situation and that he was not mad.

Even were the victim's actions sufficient to constitute adequate provocation, there was a sufficient lapse of time between the provocation and the killing for the passions to "cool." *See State v. Ramirez,* 116 Ariz. 259, 569 P.2d 201 (1977). The record shows that the trial court did consider this evidence of possible provocation and found that appellant may have had reason to be provoked, that he

was under some stress, and may have had motives for killing the victim, but "nothing more."

The third mitigating factor advanced by appellant is the information given to Dr. Gurland, the defense psychiatrist, while appellant was under the influence of sodium amytal, which according to the doctor, was consistent with appellant's innocence. While sodium amytal evidence is not admissible in Arizona courts, *see State v. Thomas*, 79 Ariz. 158, 285 P.2d 612 (1955), *cert. denied*, 350 U.S. 950, 76 S.Ct. 326, 100 L.Ed. 828 (1956), mitigation evidence presented under Arizona's death penalty statute need not meet the normal standards for admissibility.

Both Dr. Gurland and Dr. LaWall, the state psychiatrist, agreed that under certain circumstances a sodium amytal interview can be reliable. Both doctors also agreed that it is not a "truth serum," that persons can lie and fabricate while under the influence of the drug.

The trial court had this medical testimony before it to determine appellant's credibility as well as evidence adduced at trial including appellant's own testimony along with appellant's prior conviction for forgery introduced for impeachment purposes. The record shows the trial court considered all the evidence presented at trial and at the post-trial hearings and found no mitigating factors sufficiently substantial to call for leniency.

We have carefully reviewed the record as required to determine whether the factors in mitigation outweigh the aggravating circumstances, *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977), and we find they do not.

CONSTITUTIONAL ARGUMENTS

First, appellant asks that his death sentence be set aside because it is disproportionate to the sentence imposed in similar cases. This is not true. Our analysis in *State v. Gretzler, supra*, of the various death penalty cases which have come before this Court, reveals the similarities in the cases in which the death penalty was affirmed. As we discussed in the section on aggravating circumstances, *infra*, the instant case does have similarities to other cases where the death penalty was imposed.

Another constitutional attack raised by appellant is that the Arizona scheme for the imposition of the death penalty is unconstitutionally vague. We have addressed this issue many times before with a resolution adverse to appellant. *State v. Gretzler, supra; State v.Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979).

The ninth circuit has resolved the issue in a similar manner. *Knapp v. Cardwell*, 667 F.2d 1253 (9th Cir.1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982).

Additionally appellant contends that the reimposition of his death sentence pursuant to *State v. Watson, supra*, is an unconstitutional violation of the following: the due process clause, the ex post facto clause, the double jeopardy guarantees, the prohibition against judicially created penalties, and the guarantee of a republican form of government and a separation of powers. These issues have each been previously determined, again, with

a resolution adverse to appellant. *Knapp v. Cardwell, supra; State v. Gretzler, supra.*

We have reviewed the entire record pursuant to A.R.S. § 13-4035 and found no fundamental error. In our independent determination we found one aggravating factor – that the offense was committed in an especially heinous and depraved manner – and no mitigating factors sufficiently substantial to call for leniency. Judgment of conviction and sentence are affirmed.

GORDON, V.C.J., and HAYS, CAMERON and FELDMAN, JJ., concur.

Supreme Court, U.S.
FILED
NOV 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-189

In The

Supreme Court of the United States

October Term, 1989

SAMUEL A. LEWIS, Director, Arizona Department of Corrections, and DONALD WAWRZASZEK, Superintendent, Arizona State Prison,

Petitioners,

vs.

JIMMIE WAYNE JEFFERS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' BRIEF ON THE MERITS

ROBERT K. CORBIN
Attorney General of
the State of Arizona

JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division

*GERALD R. GRANT
Assistant Attorney General
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542-4686

Attorneys for PETITIONERS

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Where a federal court has determined that a state court has adopted a constitutionally narrow definition of an aggravating circumstance in a capital case, may the federal court make a de novo review of the evidence supporting the state court's finding of that aggravating circumstance?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CASES AND AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
THE NINTH CIRCUIT ERRONEOUSLY SET ASIDE RESONDENT'S DEATH SENTENCE BASED ON ITS FINDING THAT THE EVIDENCE DID NOT SUPPORT THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS "ESPECIALLY HEINOUS AND DEPRAVED."	6
CONCLUSION	19

TABLE OF CASES AND AUTHORITIES

	Page
CASES	
Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)	7
Barclay v. Florida, 463 U.S. 939 (1983)	8, 12
Chaney v. Lewis, 801 F.2d 1191 (9th Cir. 1986)	6
Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983)	10
Godfrey v. Georgia, 446 U.S. 420 (1980)	9, 10, 11, 12
Hildwin v. Florida, ___ U.S. ___, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1988)	13
Jackson v. Virginia, 443 U.S. 307 (1979)	13
Jeffers v. Ricketts, 627 F. Supp. 1334 (D. Ariz. 1986)	5
Jeffers v. Ricketts, 832 F.2d 476 (9th Cir. 1987)	5, 7
Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986)	10
Maynard v. Cartwright, 486 U.S. 356 (1988)	11
McCleskey v. Kemp, 481 U.S. 279 (1987)	9, 12
Poland v. Arizona, 476 U.S. 147 (1986)	13
State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979)	16
State v. Ceja, 126 Ariz. 35, 612 P.2d 491 (1980)	16
State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983)	15
State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105 (1983)	4, 12
State v. Poland, 144 Ariz. 388, 698 P.2d 183 (1985)	17
State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976)	14

TABLE OF CASES AND AUTHORITIES – cont.

Page

State v. Smith, 138 Ariz. 79, 673 P.2d 17 (1983)...14, 15

State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978) 16

AUTHORITIES

28 U.S.C.
§ 1254(1) 1

§ 2254(d) 8, 10

United States Constitution
Eighth Amendment 1

Fourteenth Amendment 1

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 832 F.2d 476 (1987).

The opinion of the United States District Court for the District of Arizona is reported at 627 F. Supp. 1334 (1986).

The opinion of the Supreme Court of Arizona affirming respondent's convictions and sentences is reported at 135 Ariz. 404, 661 P.2d 1105 (1983).

JURISDICTION

This Court granted petitioners' petition for writ of certiorari on October 10, 1989, to review the judgment of the United States Court of Appeals for the Ninth Circuit. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The pertinent part of the Fourteenth Amendment to the Constitution of the United States provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

In August of 1976, respondent was incarcerated in the Pima County jail.[1] While there, he obtained a copy of a police report which stated that his girlfriend, Penelope Cheney, had given information to the police about respondent and his narcotics-related activities. Respondent wrote a note to another jail inmate offering him money if he would kill Cheney. Respondent asked a detention officer to deliver the note, but the officer read the note and turned it over to his supervisor.

On October 8, 1976, respondent was released from jail on bond. Shortly afterwards, he met Doris Van Der Veer at a party and began living with her at a Tucson motel. Respondent had Van Der Veer deliver a note to Cheney, inviting her to the motel.

On October 20, 1976, respondent told Van Der Veer that Cheney was coming over and asked her to leave during Cheney's visit. As Van Der Veer left the motel room, Cheney arrived and respondent introduced the two women. Respondent and Cheney then went inside the motel room.

Van Der Veer waited around the motel grounds for about 2 hours. She then went back to the motel room and knocked on the door. Respondent answered, pointed a gun at Van Der Veer, and told her to sit down and be quiet. Cheney, who appeared to be unconscious, was lying on her back on the bed.

---

[1] All facts are taken from the decision of the Arizona Supreme Court. (Joint Appendix at 17-20, 59-63.)

Respondent then injected a fluid into Cheney's hand and said, "I have given her enough shit to kill a horse and this bitch won't die." Van Der Veer, a former nurse, noticed foam coming from Cheney's mouth (a sign of a drug overdose). After checking Cheney's condition and determining that she was still alive, Van Der Veer asked respondent if he was going to help Cheney. He responded, "No, I am going to kill her."

Respondent took Cheney's belt off, straddled her, and began to choke her with it. When Cheney continued to breathe, respondent discarded the belt and began choking her with his hands. Van Der Veer told respondent to stop because Cheney was going to die anyway, but respondent said, "No, I've seen her this way before and she's come out of it." Respondent continued choking Cheney and then told Van Der Veer to check Cheney's pulse. Van Der Veer could not find a pulse and told respondent that Cheney was dead.

Respondent prepared another syringe of heroin and had Van Der Veer inject it into Cheney's groin and hand. He also told her to get on top of Cheney and choke her. Respondent took photographs of Van Der Veer as she complied with his orders, telling her that he now had proof that Van Der Veer was an accomplice.

Apparently still not satisfied, respondent climbed back on top of Cheney and began beating her in the face with his hands. Respondent called Cheney a "bitch" and a "dirty snitch" and, as each blow landed, said, "This one is for [naming several names]." He finally dragged Cheney's body to the bathroom and put it in the shower stall.

After 3 days in the shower stall, the body began to smell. Respondent and Van Der Veer wrapped the body in newspapers and garbage bags and put it in a sleeping bag. They then drove the body to the Sedona area and buried it in a shallow grave.

The state later charged respondent with the first-degree murder of Cheney and with aggravated assault on Van Der Veer. On February 9, 1978, a jury found him guilty of both charges. Following an aggravation-mitigation hearing, the trial court sentenced respondent to death for the murder and to a prison term of not less than 5 years nor more than 10 years for the assault. (Joint Appendix at 9-10.)

While respondent's direct appeal was pending, the Supreme Court of Arizona ordered him resentenced pursuant to *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978). After another aggravation-mitigation hearing, the trial court again sentenced respondent to death. The death sentence was based on two aggravating circumstances: that respondent created a grave risk of death to Van Der Veer, and that he committed the murder in an especially heinous, cruel and depraved manner. (Joint Appendix at 12-14.) The case then returned to the Arizona Supreme Court, which affirmed the convictions and sentences. *State v. Jeffers*, 135 Ariz. 404, 661 P.2d 1105, *cert. denied*, 464 U.S. 865 (1983). In affirming the death sentence, the supreme court overturned the trial court's "grave risk of death" finding and its finding that the murder was "especially cruel." It affirmed the finding that the murder was "especially heinous and depraved." (Joint Appendix at 58-63.)

On December 2, 1983, respondent filed a petition for writ of habeas corpus in the United States District Court. On February 4, 1986, the district court denied relief. *Jeffers v. Ricketts*, 627 F. Supp. 1334 (D. Ariz. 1986).

Respondent then appealed to the Ninth Circuit. On November 9, 1987, a three-member panel of the Ninth Circuit rejected respondent's attacks on his convictions. Two members of the panel, however, vacated respondent's death sentence on the ground that the "especially heinous or depraved" aggravating circumstance was incorrectly applied to respondent. The two-member majority found that Arizona had adopted an adequate narrowing construction of the circumstance, but held that the construction could not be applied to respondent "without losing its ability to distinguish in a principled manner between those it condemns to death and those it does not." *Jeffers v. Ricketts*, 832 F.2d 476, 486 (9th Cir. 1987). On April 14, 1989, the Ninth Circuit denied petitioners' motion for rehearing and suggestion for rehearing en banc.

Petitioners filed their petition for writ of certiorari on July 13, 1989. On October 10, 1989, this Court granted the petition.

SUMMARY OF ARGUMENT

In setting aside respondent's death sentence, the Ninth Circuit improperly substituted its judgment for that of the Arizona Supreme Court. Once the Ninth Circuit had determined that Arizona had adopted an adequate narrowing construction of the "especially heinous

or depraved" aggravating circumstance, it should have gone no further. Assuming that the Ninth Circuit did have authority to determine whether the evidence supported the finding of that circumstance, its review of the finding should have been deferential and limited, rather than complete and independent.

Even if the Ninth Circuit's standard of review was proper, its analysis was faulty. Its review of selected Arizona cases does not demonstrate any error in the finding that respondent's conduct was "especially heinous and depraved."

ARGUMENT

THE NINTH CIRCUIT ERRONEOUSLY SET ASIDE RESPONDENT'S DEATH SENTENCE BASED ON ITS FINDING THAT THE EVIDENCE DID NOT SUPPORT THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS "ESPECIALLY HEINOUS AND DEPRAVED."

A. The Ninth Circuit Applied an Incorrect Standard of Review in Determining that the "Especially Heinous and Depraved" Aggravating Circumstances Could Not Be Constitutionally Applied in this Case.

In his federal habeas corpus petition, respondent argued that Arizona's "especially heinous, cruel or depraved" aggravating circumstance was unconstitutionally vague on its face. The Ninth Circuit rejected this argument, relying on an earlier decision in *Chaney v. Lewis*, 801 F.2d 1191 (9th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987). The federal court concluded that the Arizona

Supreme Court had narrowly construed the meaning of this circumstance, thereby limiting sentencing discretion so as to prevent arbitrary and capricious capital sentencing decisions.[2] *Jeffers v. Ricketts*, 832 F.2d at 482. Since respondent did not file a cross-petition for writ of certiorari, that issue is not before this Court in this case.[3]

Respondent also argued that the "especially heinous, cruel or depraved" circumstance was unconstitutionally vague as applied to him. Here, two members of the three-member Ninth Circuit panel agreed with respondent. The majority reviewed a few reported Arizona cases, compared them with respondent's case, and concluded that Arizona's narrow construction of the circumstance could not be applied to respondent "without losing its ability to distinguish in a principled manner between those it condemns to death and those it does not." 832 F.2d at 486. Although the majority allowed that respondent's murder of Penelope Cheney "certainly qualifie[d]" as a "grisly affair," it found the murder insufficiently "shocking" to meet Arizona's standard for this aggravating circumstance. 832 F.2d at 484.

---

[2] Seven members of the Ninth Circuit's limited en banc court of 11 judges reached the opposite conclusion several months later in *Adamson v. Ricketts*, 865 F.2d 1011, 1031-39 (9th Cir. 1988). The state's certiorari petition from the *Adamson* decision is pending before this Court. *Ricketts v. Adamson*, No. 88-1553.

[3] On October 2, 1989, this Court granted certiorari in another Arizona case raising this same issue. *Walton v. Arizona*, No. 88-7351.

In essence, the Ninth Circuit simply substituted its judgment for that of the Arizona Supreme Court on whether the facts of this case were sufficient to establish the "especially heinous and depraved" circumstance. This is a significant step for a federal court to take in reviewing a state court's application of the state's own law. If the Ninth Circuit has the authority to make its own decision whether an aggravating circumstance is supported by the evidence, may it also find evidentiary support for a mitigating circumstance that the state court determined did not exist? May it also overturn a state court determination that a capital defendant's mitigating evidence was insufficient to call for leniency? Petitioners submit that these hypothetical decisions, like the decision in this case, exceed the bounds of the Ninth Circuit's authority to review state court decisions.

In general, federal review of state criminal convictions is limited and deferential. For example, federal courts reviewing a state prisoner's petition for writ of habeas corpus must give state court factual findings a presumption of correctness. *See* 28 U.S.C. § 2254(d). The Ninth Circuit's review of the state court finding that respondent's conduct was especially heinous and depraved was far from deferential and is inconsistent with principles of federalism and comity.

This Court has not exercised wide, intrusive powers of review in capital cases. Rather, the thrust of this Court's decisions has been to insure that sentencing discretion is suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious actions. *Barclay v. Florida*, 463 U.S. 939, 950 (1983). Where a state's

sentencing procedures focus discretion on the particularized nature of the crime and the particularized character of the defendant, this Court may lawfully presume that the defendant's death sentence was not wantonly and freakishly imposed, and thus that the sentence is not disproportionate within any recognized meaning under the Eighth Amendment. *McCleskey v. Kemp*, 481 U.S. 279, 308 (1987). Justice White has described the limited review of federal courts:

> [O]ur role is not to peer majestically over the lower court's shoulder so that we might second-guess its interpretation of facts that quite reasonably – perhaps even quite plainly fit within the statutory language.

Godfrey v. Georgia, 446 U.S. 420, 450 (1980) (White, J., dissenting) (footnote omitted).

The Eleventh Circuit has recognized similar limits to its reviewing authority. In rejecting a death row inmate's claim that the Florida Supreme Court had violated the Eighth Amendment by failing to apply in his case the same standard of review applied in other cases, the Eleventh Circuit said:

> While petitioner characterizes this contention as the Florida Supreme Court's failure to apply a consistent standard of review in violation of *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), the district court correctly discerned that he is simply 'quarreling' with the state court. Where in a capital punishment case the state courts have acted through a properly drawn statute with appropriate standards to guide discretion, *Proffitt v. Florida*, 428 U.S. at 258-59, 96 S. Ct. at 2969, federal courts will not undertake a case-by-case comparison of

> the facts in a given case with the decisions of the state supreme court. *Spinkellink v. Wainwright*, 578 F.2d 582, 604-05 (5th Cir. 1978), *cert denied*, 440 U.S. 976, 99 S. Ct. 1548, 59 L. Ed. 2d 796 (1979). This rule stands even though were we to retry the aggravating and mitigating circumstances in these cases, 'we may at times reach results different from those reached in the Florida state courts.' Id. at 605.

Ford v. Strickland, 696 F.2d 804, 819 (11th Cir.) (en banc), *cert. denied*, 464 U.S. 865 (1983). The Eleventh Circuit later modified its views on its power to review the evidence supporting aggravating and mitigating circumstances, but still maintained a deferential review by applying the presumption of correctness under 28 U.S.C. § 2254(d). *Magwood v. Smith*, 791 F.2d 1438, 1449 (11th Cir. 1986).

The Ninth Circuit's decision in this case is a clear break with this precedent. Although the majority relied heavily on *Godfrey* to support its decision to vacate respondent's death sentence, *Godfrey* does not authorize federal court review of the facts supporting an aggravating circumstance that is not impermissibly vague on its face. Godfrey's death sentence was based on a jury finding that his murders were "outrageously or wantonly vile, horrible and inhuman." Because the jury received no instructions on the meaning of the aggravating circumstance, and because the Georgia Supreme Court's appellate review of the jury's finding was limited to a statement that the finding was "factually substantiated," this Court reversed Godfrey's death sentence. It was the failure of the Georgia courts to narrowly define and apply the aggravating circumstance that required reversal, not this Court's conclusion that the facts did not

support the jury's finding. *Godfrey v. Georgia*, 446 U.S. at 435 n.1 (Marshall, J., concurring). Thus, *Godfrey* only authorizes the first conclusion reached by the Ninth Circuit regarding this aggravating circumstance: that the Arizona courts had narrowly construed the circumstance so as to prevent arbitrary and capricious actions.

Maynard v. Cartwright, 486 U.S. 356 (1988), also does not authorize the Ninth Circuit's action in this case. Cartwright's death sentence was based on a jury finding that his murder was "especially heinous, atrocious or cruel." Because the jury received no guidance on the meaning of the aggravating circumstance, its sentencing discretion was unfettered. That unfettered discretion was not cured by the Oklahoma Criminal Court of Appeals, which appeared merely to survey the facts to see whether the circumstance existed, without saying what factors had to be present to sustain it. Thus, as it did in *Godfrey*, this Court reversed Cartwright's death sentence.

In this case the Ninth Circuit acknowledged that the Arizona Supreme Court had narrowly defined and applied the "especially heinous, cruel or depraved" aggravating circumstance. This decision, which respondent has not asked this Court to review, is authorized by *Godfrey* and *Wainwright*. The Ninth Circuit's decision to go farther and review the state court's factual findings and its application of the circumstance to respondent exceeds the scope of federal review. Arizona's narrow construction of the circumstance and its numerous procedural protections (sentencing by a judge rather than a jury, proof of aggravation beyond a reasonable doubt, written findings by the sentencing judge, automatic and independent review by the state supreme court, etc.)

allow this Court to lawfully presume that respondent's death sentence was not wantonly and freakishly imposed. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

The Arizona Supreme Court carefully reviewed the applicable case law and the evidence in respondent's case. Its review led it to set aside the trial court's finding that the murder was committed in an especially cruel manner. *State v. Jeffers*, 135 Ariz. at 429, 661 P.2d at 1130. It also concluded that the murder was committed in an especially heinous and depraved manner. This Court's mandate does not extend to interfering with fact-finders in state criminal proceedings or with state courts that are responsibly and consistently interpreting state law, unless that interference is predicated on a violation of the Constitution. *Godfrey v. Georgia*, 446 U.S. at 451 (White, J., dissenting). Because the Ninth Circuit had determined that Arizona's definition of the aggravating circumstance was sufficiently narrow, there was no federal constitutional predicate on which to overturn the state court's conclusion that the murder was especially heinous and depraved. Under these circumstances, Arizona's application of its own law is not subject to federal review.

But even if federal review is permissible, it is certainly not as extensive as that employed by the Ninth Circuit. A plurality of this Court has stated that its review of the evidence supporting state court findings of aggravating circumstances is limited to determining whether the findings are so unprincipled or arbitrary as to somehow violate the Constitution. *Barclay v. Florida*, 463 U.S. at 947. As discussed above, the Arizona Supreme Court's analysis of the case law and the evidence was careful and thorough, and included a reversal of a portion of the trial

court's finding. Under these circumstances, the finding that the murder of Penelope Cheney was especially heinous and depraved was neither unprincipled nor arbitrary, and did not violate the Constitution.

The dissenting member of the Ninth Circuit panel applied another possible standard of review: whether any rational fact-finder could have found the existence of the aggravating circumstance. This "rational factfinder" standard is taken from that used in *Jackson v. Virginia*, 443 U.S. 307 (1979), for federal habeas review of a state prisoner's claim that the evidence did not support his conviction. This Court does not equate the finding of an aggravating circumstance with a jury finding of guilt. See *Hildwin v. Florida*, ___ U.S. ___, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1988) (existence of an aggravating factor is not an element of the offense and need not be found by a jury); *Poland v. Arizona*, 476 U.S. 147 (1986) (failure to find any aggravating circumstance is not an "acquittal" of that circumstance for double jeopardy purposes). Nevertheless, a "rational factfinder" standard would accord deference to the state court finding, which the Ninth Circuit failed to do.

The Constitution does not authorize federal courts to make their own assessments of the evidence supporting a state court's finding of an aggravating circumstance. The Ninth Circuit overstepped this boundary when it set aside respondent's death sentence. Therefore, this Court should reverse the Ninth Circuit and clearly enunciate the proper standard to be used by federal courts in reviewing a state court finding of an aggravating circumstance.

B. The Ninth Circuit Incorrectly Applied and Interpreted Arizona Law in Setting Aside Respondent's Death Sentence.

To support its conclusion that the "especially heinous and depraved" circumstance could not be applied to respondent, the Ninth Circuit reviewed only a few of the Arizona cases that discussed the circumstance. According to the Ninth Circuit, these cases demonstrated that respondent's conduct was neither especially heinous nor especially depraved.[4] A review of these cases, however, establishes the opposite conclusion.

In *State v. Smith*, 138 Ariz. 79, 673 P.2d 17 (1983), the only evidence that Smith murdered in an especially heinous and depraved manner was the uncorroborated testimony of his accomplice that, after the victim's body had been buried, Smith had requested the playing of a tape of the song, "We Are the Champions." Evidence also showed that Smith later attempted suicide, partly out of remorse over the murder. The Arizona Supreme Court set aside the trial court's finding that the murder was especially heinous and depraved because of the "equivocal"

[4] In each capital case, the Arizona Supreme Court performs an independent review of the evidence supporting the trial court's findings on aggravating circumstances. *State v. Richmond*, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976), *cert. denied*, 433 U.S. 915 (1977). It also compares the evidence in the case before it with the evidence present in previous capital cases it has considered. A basic problem with a federal court attempting to make this type of comparative review is that the federal court does not have before it the complete record of those other cases. Thus, it is not possible for a federal court to fully compare the evidence supporting the aggravating factor found in respondent's case with the evidence in other cases.

nature of the evidence: Smith had denied requesting the playing of the tape and the only evidence that he had done so came from his accomplice.

In contrast, the evidence establishing respondent's heinous and depraved attitude dealt with his conduct during or immediately after the killing. The evidence also did not come from an accomplice, as did the evidence in *Smith*. Doris Van Der Veer was the victim of the assault with a deadly weapon charge in this case, and respondent forced her to become involved in Cheney's murder. The trial court found that Van Der Veer was not an accomplice. (Joint Appendix at 8.) Finally, respondent, unlike Smith, expressed no remorse over the murder.

The next case the Ninth Circuit reviewed was *State v. Graham*, 135 Ariz. 209, 660 P.2d 460 (1983). Graham, who suffered from organic brain damage and was extremely immature and easily influenced by others, killed a man by shooting him twice. After the murder, Graham smiled while telling friends that the victim "squealed like a rabbit" when he was shot. The Arizona Supreme Court concluded that Graham's statement about the killing was more likely attributable to his immaturity, nervousness and need to impress his peers than to a hardened attitude towards the death of another.

Respondent was not immature or easily influenced by others and did not suffer from organic brain damage. His comments were made while straddling and repeatedly striking his dying victim. His words and conduct, unlike Graham's, plainly showed an especially heinous or depraved state of mind.

State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979), involved a murder that occurred during a drug ripoff. Brookover shot his victim once in the back. As the victim lay on the floor moaning, Brookover said, "Don't worry * * * it will be over soon" and shot him again in the back. The Arizona Supreme Court concluded that the murder was not especially heinous or depraved.

Penelope Cheney, unlike Brookover's victim, did not suffer a relatively quick death. Respondent, unlike Brookover, climbed atop his victim and debased her by striking and cursing her. Respondent killed his victim because she had "snitched" on him and his words and conduct show that he relished the killing.

In *State v. Ceja*, 126 Ariz. 35, 612 P.2d 491 (1980), the defendant murdered two people in order to steal a large amount of marijuana from them. Ceja shot the first victim seven times, four times in the head at close range. He shot the second victim four times, twice at extremely close range, and then kicked him in the face. The Arizona Supreme Court concluded that the murders were especially heinous and depraved.

If anything, respondent's conduct was more reprehensible than Ceja's. Respondent overdosed his victim with heroin, strangled her with a belt and with his hands, and then climbed on top of her to beat and curse her. Respondent was certainly as determined to kill as Ceja, and surpassed Ceja in personally debasing his victim.

The Ninth Circuit also reviewed *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978). Watson and Reid burglarized a home. While Watson was upstairs, the homeowner began shooting at Reid. Watson came back

downstairs and shot the victim in the back four times, the last time while the victim was face down on the floor. The Arizona Supreme Court concluded that this killing was not especially heinous or depraved.

Penelope Cheney, unlike Watson's victim, did not initiate violence that led to her death. Watson, unlike respondent, did not debase his victim by striking and cursing him. Watson, unlike respondent, had no firm intent to kill anyone and used deadly force only after the victim did.

In *State v. Poland*, 144 Ariz. 388, 698 P.2d 183 (1985), the defendants were convicted of the murder of two armored car guards. There was no direct evidence regarding the circumstances surrounding the deaths. It was this lack of evidence that led the Arizona Supreme Court to conclude that the state had failed to prove that the murders were heinous or depraved.

There is no lack of evidence regarding the circumstances of Penelope Cheney's death and respondent's role in it. His words and actions plainly establish the heinousness and depravity of this murder.

The cases the Ninth Circuit reviewed fail to establish any reason why the especially heinous and depraved aggravating circumstance cannot be constitutionally applied to respondent. The evidence, which respondent does not challenge, shows that he formed his intent to kill Penelope Cheney far in advance of the actual murder. He then lured her to his motel room and gave her an overdose of heroin that rendered her helpless. When this failed to kill Cheney, respondent embarked on a lengthy series of acts designed to finish the job. Respondent did

not stop once Van Der Veer told him that Cheney was dead. He forced van Der Veer to participate and then further degraded the victim by cursing and beating her. Even under the standard of review employed by the Ninth Circuit, this evidence shows that respondent committed the murder in an especially heinous and depraved manner. The Ninth Circuit erred in holding that the Constitution required setting aside respondent's death sentence.

CONCLUSION

Once the Ninth Circuit determined that Arizona's "especially heinous, cruel or depraved" aggravating circumstance was not impermissibly overbroad on its face, it should not have reviewed the evidence supporting the finding of that circumstance. Even if such review is permitted, the Ninth Circuit's review was not deferential to the state court finding. The Ninth Circuit simply substituted its judgment for that of the Arizona Supreme Court. Finally, even under the standard employed by the Ninth Circuit, the Constitution does not require setting aside respondent's death sentence. Therefore, petitioners ask this Court to reverse that portion of the Ninth Circuit's decision and reinstate respondent's death sentence.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division

GERALD R. GRANT
Assistant Attorney General
(Counsel of Record)
Criminal Division
Department of Law
1275 W. Washington, 1st Floor
Phoenix, Arizona 85007
Telephone: (602) 542-4686

Attorneys for PETITIONERS

BEST AVAILABLE COPY

COUNTERSTATEMENT OF QUESTION PRESENTED:

Whether the Court of Appeals for the Ninth Circuit correctly held that Arizona's construction of its "especially heinous ... or depraved" aggravating circumstance in this case violated the rule of Godfrey v. Georgia and Maynard v. Cartwright.

TABLE OF CONTENTS

COUNTERSTATEMENT OF THE QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

A. Facts 1

B. Trial Court Proceedings . 9

C. Proceeding in the Arizona Supreme Court 13

D. Federal Habeas Corpus Proceedings 17

SUMMARY OF ARGUMENT 23

ARGUMENT 29

I. INTRODUCTION 29

II. MAYNARD AND GODFREY DICTATE THE COURT OF APPEALS' CONCLUSION THAT THE ARIZONA "ESPECIALLY HEINOUS ... OR DEPRAVED" CIRCUMSTANCE FAILED TO SERVE ITS CONSTITUTIONAL NARROWING FUNCTION 38

A. The Arizona Supreme Court's Construction of the "Especially Heinous ... or Depraved" Circumstance Runs Afoul of the Eighth Amendment Rule of Maynard 38

B. The Arizona Courts' Application of the "Heinous ... or Depraved" Aggravating Circumstance in Mr. Jeffers' Case Runs Afoul of the Eighth Amendment Rule of Godfrey 74

III. ARIZONA'S EFFORTS TO AVOID THE CLEAR DICTATES OF MAYNARD AND GODFREY BY CREATING A SPURIOUS "STANDARD OF REVIEW" ISSUE ARE UNAVAILING 91

CONCLUSION 107

APPENDIX A: Arizona Revised Statute § 13-703 ..... A-1

APPENDIX B: Arizona Trial and Supreme Court Treatment of the (F)(6) Aggravating Circumstance, 1974-89 ..... B-1

TABLE OF AUTHORITIES

Cases	Page
Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988), petition for cert. filed	passim
Arizona v. Rumsey, 467 U.S. 203 (1984)	31
Barclay v. Florida, 463 U.S. 939 (1983)	31, 32, 37, 96
Cabana v. Bullock, 474 U.S. 376 (1986)	103
California v. Brown, 479 U.S. 538 (1987)	32
California v. Ramos, 463 U.S. 992 (1983)	77
Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987), aff'd, 486 U.S. 356 (1988)	passim
Chaney v. Lewis, 801 F.2d 1191 (9th Cir. 1986), cert. denied, 481 U.S. 1023 (1987)	20
Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1985)	43

Cuyler v. Sullivan, 446 U.S. 335 (1980)	104
Drope v. Missouri, 420 U.S. 162 (1975)	104
Eddings v. State, 616 P.2d 1159 (Okla. Crim. App. 1980), rev'd on other grounds, 455 U.S. 104 (1982)	50
Ford v. Strickland, 696 F.2d 804 (11th Cir.), cert. denied, 464 U.S. 865 (1983) ..	96
Francis v. Franklin, 471 U.S. 307 (1985)	104
Furman v. Georgia, 408 U.S. 238 (1972)	passim
Gardner v. Florida, 430 U.S. 349 (1978)	32
Godfrey v. Georgia, 446 U.S. 420 (1980)	passim
Gregg v. Georgia, 428 U.S. 153 (1976)	31, 33, 35, 42, 71, 97
Haynes v. Washington, 373 U.S. 503 (1963)	99
Jackson v. Denno, 378 U.S. 368 (1964)	100

Jackson v. Virgina, 443 U.S. 307 (1979) 21, 34, 95, 96, 105

Jeffers v. Ricketts, 832 F.2d 476 (9th Cir. 1987), cert. granted, 110 S. Ct. 232 (1989) ..... passim

Jeffers v. Ricketts, 627 F. Supp. 1344, aff'd in part and rev'd in part, 832 F.2d 476 (9th Cir. 1987), cert. granted, 110 S. Ct. 232 (1989) 6, 7, 17, 60, 81

Lockett v. Ohio, 438 U.S. 586 (1978) 9

Lowenfield v. Phelps, 484 U.S. 213, 108 S. Ct. 546 (1988) ... 30, 32, 95, 96, 101

Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986), cert. denied, 110 S. Ct. 291 (1989) 96

Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853 (1988) .. passim

McCleskey v. Kemp, 481 U.S. 279 (1987) 32, 44, 97, 105

Miller v. Fenton, 474 U.S. 104 (1985) 100, 101

Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860 (1988) .. 103

Mincey v. Arizona, 437 U.S. 385 (1978) 100

Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989) 37,43, 44

Norris v. Alabama, 326 U.S. 271 (1945) 104

Penry v. Lynaugh, 109 S. Ct. 2934 (1989) 103

Proffitt v. Florida, 428 U.S. 242 (1976) 42, 45, 47

Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), cert. denied, 464 U.S. 1002 (1983) 37, 56, 57, 106

Pulley v. Harris, 465 U.S. 37 (1984) 54, 30, 72

Rogers v. Richmond, 365 U.S. 534 (1961) 100, 101

Smith v. Phillips, 455 U.S. 209 (1982) 28, 43

State v. Arnett, 125 Ariz. 201, 608 P.2d 778 (1980) 60

State v. Arnett, 119 Ariz. 38, 579 P.2d 542 (1978) 69, 89

State v. Beaty, 158 Ariz. 232, 762 P.2d 519 (1988), cert. denied, 109 S.Ct. 3200 (1989) 44, 48, 49, 50, 69

State v. Blazak, 131 Ariz. 598, 643 P.2d 694, cert. denied, 459 U.S. 882 (1982) 60, 89

State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979) 54, 62, 86

State v. Carr, 154 Ariz. 468, 743 P.2d 1386 (1987) 60, 86, 89

State v. Carriger, 143 Ariz. 142, 692 P.2d 991 (1984), cert. denied, 471 U.S. 1111 (1985) 48, 67

State v. Ceja, 126 Ariz. 35, 612 P.2d 491 (1980) 49, 65, 88

State v. Ceja, 115 Ariz. 413, 565 P.2d 1274, cert. denied, 434 U.S. 975 (1977) 49, 88

State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067 (1980) 84

State v. Correll, 148 Ariz. 468, 715 P.2d 721 (1986) 49, 50, 64, 67

State v. Cruz-Mata, 138 Ariz. 370, 674 P.2d 1368 (1983) 62

State v. Dixon, 283 So. 2d 1 (1973), cert. denied, 416 U.S. 943 (1974) 45, 47

State v. Fisher, 141 Ariz. 227, 686 P.2d 750, cert. denied, 469 U.S. 1066 (1984) 68, 88

State v. Fulminante, 161 Ariz. 237, 778 P.2d 602 (1988), petition for cert. filed 48, 64, 69

State v. Gerlaugh, 144 Ariz. 449, 698 P.2d 694 (1985) 84, 88

State v. Gillies, 142 Ariz. 564, 691 P.2d 655 (1984), cert. denied, 470 U.S. 1059 (1985) 69, 84

State v. Gillies, 135 Ariz. 500, 662 P.2d 1007 (1983) 64, 65

State v. Girdler, 138 Ariz. 482, 675 P.2d 1301 (1983), cert. denied, 467 U.S. 1244 (1984) 68

State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983) 55, 57, 61, 87

State v. Gretzler, 135 Ariz. 42, 659 P.2d 1, cert. denied, 461 U.S. 971 (1983) ..... passim

State v. Harding, 141 Ariz. 492, 687 P.2d 1247 (1984) 48

State v. Harding, 137 Ariz. 278, 670 P.2d 383 (1983), cert. denied, 465 U.S. 1013 (1984) 50

State v. Hensley, 142 Ariz. 598, 691 P.2d 689 (1984) 67

State v. James, 141 Ariz. 141, 685 P.2d 1293, cert. denied, 469 U.S. 990 (1984) 48, 61, 55, 66

State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105, cert. denied, 464 U.S. 865 (1983) .. 13, 49, 50, 54

State v. Johnson, 147 Ariz. 395, 710 P.2d 1050 (1985) 49, 62, 63, 68

State v. Kinkade, 147 Ariz. 250, 709 P.2d 884 (1985) 86

State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied, 435 U.S. 908 (1978) 46, 69, 77

State v. LaGrand, 153 Ariz. 21, 734 P.2d 563, cert. denied, 484 U.S. 872 (1987) 57, 88

State v. Lamb, 142 Ariz. 463, 690 P.2d 764 (1984) 87

State v. Lambright, 138 Ariz. 63, 673 P.2d 1 (1983), cert. denied, 469 U.S. 892 (1984) .. 61, 84

State v. Libberton, 141 Ariz. 132, 685 P.2d 1284 (1984) 44

State v. Lujan, 124 Ariz. 365, 604 P.2d 629 (1979) 49, 63

State v. Madsen, 125 Ariz. 346, 609 P.2d 1046, cert. denied, 449 U.S. 873 (1980) 48, 62, 69, 86

State v. Martinez-Villareal, 145 Ariz. 441, 702 P.2d 670, cert. denied, 474 U.S. 975 (1985) 48, 61, 68

State v. McCall, 139 Ariz. 147, 677 P.2d 920 (1983), cert. denied, 467 U.S. 1220 (1984) . 57, 64, 88

State v. Montes, 136 Ariz. 491, 667 P.2d 191 (1983) 62

State v. Moorman, 154 Ariz. 578, 744 P.2d 679 (1987) 55, 68

State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1981), cert. denied, 456 U.S. 984 (1982) .. 50, 65

State v. Poland, 144 Ariz. 388, 698 P.2d 183 (1985), aff'd, 476 U.S. 147 (1986) 54, 62

State v. Richmond, 136 Ariz. 312, 666 P.2d 57, cert. denied, 464 U.S. 986 (1983) .. 44, 50, 60, 63, 69, 89

State v. Rockwell, 161 Ariz. 5, 775 P.2d 1069 (1989) 60, 87

State v. Roscoe, 145 Ariz. 212, 700 P.2d 1312, cert. denied, 471 U.S. 1094 (1985) 65, 68

State v. Rossi, 146 Ariz. 359, 706 P.2d 371 (1985) 84

State v. Schad, 129 Ariz. 557, 633 P.2d 366 (1981), cert. denied, 455 U.S. 983 (1982) .. 68

State v. B. Smith, 146 Ariz. 491, 707 P.2d 289 (1985) 48, 49, 54, 62, 63, 69

State v. R.D. Smith, 138 Ariz. 79, 673 P.2d 17 1983), cert. denied, 465 U.S. 1074 (1984) . 60, 61, 67, 89

State v. R.L. Smith, 141 Ariz. 510, 687 P.2d 1265 (1984) 61, 63, 68, 87

State v. Steelman, 126 Ariz. 19, 612 P.2d 475, cert. denied, 449 U.S. 913 (1980) .. 54

State v. Summerlin, 138 Ariz. 426, 675 P.2d 686 (1983) 63, 68

State v. Ricky Tison, 129 Ariz. 526, 633 P.2d 335 (1981), cert. denied, 459 U.S. 882 (1982) 48

State v. Vaughn, 147 Ariz. 28, 708 P.2d 453 (1985) 86

State v. Vickers, 159 Ariz. 532, 768 P.2d 1177 (1989) 54

State v. Vickers, 129 Ariz. 506, 633 P.2d 315 (1981) 48, 84

State v. Villafuerte, 142 Ariz. 323, 690 P.2d 42 (1984), cert. denied, 469 U.S. 1230 (1985) 63, 65

State v. Wallace, 160 Ariz. 424, 773 P.2d 983 (1989), petition for cert. filed 49, 50, 54, 68

State v. Wallace, 151 Ariz. 362, 728 P.2d 232 (1986), cert. denied, 483 U.S. 1011 (1987) 44, 59, 66

State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1979) 10, 45, 60, 89

State v. Williams, 1987 W.L. 878 (Ariz. Oct. 8, 1987) 55

State v. Woratzeck, 134 Ariz. 452, 657 P.2d 865 (1983) 50

State v. Zaragoza, 135 Ariz. 63, 659 P.2d 22, cert. denied, 462 U.S. 1124 (1983) 48, 50, 54, 65, 66, 67, 68

Stein v. New York, 346 U.S. 15 (1953) 100

Teague v. Lane, 109 S. Ct. 1060 (1989) 66

Tison v. Arizona, 481 U.S. 137 (1987) 103

United States v. New York Telephone Co., 434 U.S. 159 (1977) 43, 93

Washington v. Yakima Indian Nation, 439 U.S. 463 (1978) .. 43

Zant v. Stephens, 462 U.S. 862 (1983) ..... passim

Statutes

Ariz. Rev. Stat. § 13-703 (1989) 1, 10, 11, 31

Other Authorities

Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases, 64 N.C.L. Rev. 941 (1986) 70

R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice (6th ed. 1986) 42, 43

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provisions cited in Petitioner's Brief, this case involves Arizona Revised Statute § 13-703, which is set forth in Appendix A to this Brief.

STATEMENT OF THE CASE

A. Facts

In May 1973, the defendant Jimmie Wayne Jeffers and the victim Penelope Cheney met in a heroin rehabilitation program in Tucson, Arizona and began dating. T. 15: 156-59.[1] Ms. Cheney was addicted to heroin then and almost continuously until her death five and one-half years later; so was Mr. Jeffers until his subsequent arrest. T. 10:94-95, 14:17,

---

[1] "T." refers to the transcript of the guilt-innocence trial, followed by the volume and page numbers cited. "T." preceded by a date refers to transcripts of proceedings other than the guilt-innocence trial, which are identified by date.

15:10-12, 15:154-55.

In October 1975, Ms. Cheney moved in with Mr. Jeffers, and the two lived together off and on until they were arrested in May 1976 for possession of narcotics and stolen property. T. 15:159. During their residence together, Mr. Jeffers financed their substantial drug habits, and the two conducted a stormy relationship characterized by frequent arguments and brief separations. T. 10:77-83, 10:91, 15:17-18, 15:28, 15:104, 15:173-80; Apr. 14, 1978 T. 59.

After their arrest, Mr. Jeffers, remaining incarcerated himself, posted bond for Ms. Cheney, paid for his attorney to represent her in the case, and continued supporting her financially. 14:135-45, 15:188-89. During the late spring and summer of 1976, Ms. Cheney dropped out of the drug rehabilitation

program in which Mr. Jeffers had persuaded her to enroll, used the rent money Mr. Jeffers had provided her to buy drugs, moved in first with one and then with another male friend of Mr. Jeffers, stopped visiting him in jail and began visiting another inmate in the same cell block, and provided information to the police -- about which their joint attorney informed Mr. Jeffers -- concerning Mr. Jeffers' heroin supplier and other associates. T.6:118, 10:57-58, 10:70-71, 10:81-82, 11:137, 15:16-17, 15:85-86, 15:189-94, 16:51-63.

Mr. Jeffers was released from jail on bond on October 8, 1976. On October 15, he met Ms. Cheney and proposed that they again live together. T. 16:75-78. Ms. Cheney informed Mr. Jeffers that she had become a prostitute to support her drug habit and had moved in with the man with

whom she was sharing the proceeds of her work. Ms. Cheney then demanded money and drugs in return for sexual relations with Mr. Jeffers. T. 5:100-01, 10:73-75, 14:24, 16:75-87.

A few days later, Mr. Jeffers invited Ms. Cheney to the motel room he shared with Doris Van Der Veer, offering Ms. Cheney heroin and proposing that she give up prostitution and come back to live with him.[2] T. 5:102, 16:96-98. On October 21, 1976, Ms. Cheney telephoned in the morning to say that she was on her way over. Ms. Van Der Veer subsequently found Mr. Jeffers "showered, shaved and

[2]Mr. Jeffers met Ms. Van Der Veer several hours after learning that Ms. Cheney had become a prostitute. Ms. Van Der Veer spent that night and the next two months with Mr. Jeffers. T. 6:96-100. A convicted drug dealer, Ms. Van Der Veer had been involved in smuggling cocaine from Mexico in the preceding months and was dealing marijuana in Tucson. T. 5:82, 6:79-80, 6:218-19, 19:53-54; Mar. 6, 1978 T. 6-8.

changed" and visibly "happy and excited" at the prospect of Ms. Cheney's visit. At Mr. Jeffers' request, Ms. Van Der Veer agreed to leave the room when Ms. Cheney arrived so that Mr. Jeffers could "talk to [Ms. Cheney] about going back with her." T. 5:106, 6:138. Ms. Van Der Veer was gone two and one-half hours. T. 5:113-17. During this time, she once saw Mr. Jeffers and Ms. Cheney leave the room for a moment to buy cigarettes; they were "laughing and smiling and holding hands." T. 5:116, 6:143.

When Ms. Van Der Veer returned to the motel room, she witnessed Ms. Cheney's death. What occurred, as the trial judge in his sentencing order based upon Ms. Van Der Veer's testimony, was this:[3]

[3]These events "were not reported [to the police] until three months later despite Van Der Veer being an eyewitness" -- a three-month period during which Ms. Van Der Veer was in frequent

> Alone with the victim in the motel room, the defendant proceeded to give her heroin which she administered herself or which he administered to her. She was an heroin addict. After the initial injections, the defendant subsequently injected large dosages of heroin into the victim.[4]
>
> When Doris Van Der Veer returned to the room, the victim was lying part on and part off the bed on her back. She was cyanotic. The defendant had a

---

telephone and face-to-face contact with state law enforcement officials pursuant to her activities as a paid informant of the Arizona state police agency in regard to drug trafficking in Tucson. Jeffers v. Ricketts, 627 F. Supp. 1334, 1347 (D. Ariz. 1986); T. 6:43-55, 7:47-48, 7:116-34, 8:70, 8:82-89. Because Ms. Van Der Veer refused to talk to the police or to testify until being granted immunity for two federal weapons violations and "heroin transactions, marijuana transactions, [armed] burglary, and ... [being an] accessory to murder," Ms. Van Der Veer's "[c]redibility ... was in issue." Jeffers v. Ricketts, 627 F. Supp. at 1344. See T. 5:83, 6:15, 6:217-19, 7:55-67, 7:130-31, 8:54, 8:63, 8:98-110, 8:113-15, 9:171, 9:193-97, 12:107-09, 13:144-59.

[4]Every prosecution and defense witness who knew Ms. Cheney testified that she "had an enormous appetite for heroin" (T: 5-105) and had a history of injecting or ingesting as much heroin or "any narcotic" as "she could get her hands" on at one time, often lapsing into unconsciousness when she did so. T. 10:81, 10:94-97, 11:119, 11:122, 14:19, 14:44, 15:18-22, 15:96-99, 15:185.

> gun in his hand and after order[ing] Van Der Veer to lock the door and stay in the room, he tied the victim's arms and injected some additional heroin into her hand.
>
> He asked Van Der Veer to check the victim and see if she was still alive. Van Der Veer did and and [sic] determined that the victim was still breathing although there was hardly any pulse, and she had started to foam at the mouth.
>
> The defendant then strangled the victim with a belt and with his hands until her breathing did stop. During all this period of time, the victim was completely limp and unable to resist in any way.
>
> . . . .
>
> Shortly thereafter the defendant beat the dead victim with his hands about the face four or five times.[5] He then took the victim off the bed and placed her body in the shower stall in the motel room where it remained for three days.

J.A. 13-14 (footnotes added).

The trial court found that Mr. Jeffers

---

[5]"While striking the victim," Mr. Jeffers cursed her and "stated that each blow was for one of the persons [whose arrest] ... Jeffers believed Penny [Cheney] to have been responsible for ...." Jeffers v. Ricketts, 627 F. Supp. at 1360.

"may have had reason to be provoked" and "was under some [emotional] stress" due to Ms. Cheney's rejection of his proposal that they live together again and her insistence that any resumption of relations between them be predicated on his paying her money or drugs. J.A. 16. See Apr. 14, 1978 T. 62-65; June 20, 1980 T. 9-10, 16-17. The court also found that Mr. Jeffers was a heroin addict and "was both drinking and using narcotics on the day of the offense." J.A. 15. See T. 5:103-04, 5:137-38, 6:213-15; Apr. 14, 1978 T. 62-64; June 20, 1980 T. 11, 16, 43-44, 77-79. Ms. Van Der Veer testified that a few weeks after Ms. Cheney died, Mr. Jeffers became so depressed about her death that he attempted to and nearly did commit suicide, injecting at least eight doses of heroin and ingesting substantial quantities of valium, darvon, chloro-

hydrate tablets (a sleeping pill), and whiskey. T. 6:33-34, 7:110-11 9:178-79, 9:220-21, 14:164-71, 17:42-45.

B. Trial Court Proceedings

On February 9, 1978, a jury convicted Mr. Jeffers of premeditated first-degree murder.

Two months later, the trial judge conducted a sentencing hearing at which he sentenced Mr. Jeffers to die. Apr. 14, 1978 T. 52-82. J.A. 5-10. Following this Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978), the Arizona Supreme Court remanded Mr. Jeffers' case for resentencing under a procedure permitting broader consideration of mitigation. See State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), procedure codified in Ariz. Rev. Stat. § 13-703.

Under that procedure, the trial judge

could not impose a death sentence unless the state proved at least one statutorily enumerated aggravating circumstance beyond a reasonable doubt. He was required to "impose a sentence of death if ... [he found] one or more ... aggravating circumstances" and Mr. Jeffers did not establish one or more "mitigating circumstances sufficiently substantial to call for leniency." Id. § 13-703(E). To determine whether the mitigation warranted leniency, the trial court had to "determine whether the factors in mitigation outweigh[ed] the aggravating circumstances." J.A. 66. See Ariz. Rev. Stat. § 13-703(E).

Two days before the 1978 sentencing hearing, the Assistant County Attorney had informed counsel for Mr. Jeffers that he did not think the murder qualified as "especially heinous, cruel or depraved"

under Arizona's (F)(6) aggravating circumstance, id. § 13-703(F), because the victim did not experience any pain. Apr. 14, 1978 T. 24, 37-38, 42. Yet at both sentencing hearings the prosecutor submitted the (F)(6) circumstance as well as the circumstance defined by subsection (F)(2): that the defendant created a grave risk of death to another person in the commission of murder. Ariz. Rev. Stat. § 13-703(F)(2). Apr. 14, 1978 T. 37-38.[6]

In 1978 and again in 1980, the trial judge found both aggravating circumstances. Each time he emphasized the conjunctive nature of his finding that "[t]he defendant committed the

---

[6]At both proceedings, Mr. Jeffers argued that, unless limited to torture, the "heinous, cruel or depraved" circumstance was unconstitutionally vague and overbroad, citing (in 1980) Godfrey v. Georgia, 446 U.S. 420 (1980). Apr. 14, 1978 T. 37-44; July 10, 1980 T. 196.

offense of first degree murder in an especially heinous, cruel, and depraved manner." J.A. 7, 12. See Apr. 14, 1978 T. 37; June 20, 1980 T. 3. At the first sentencing hearing, the trial court explained its (F)(6) finding only by stating that "[t]he Court has considered the defendant's behavior ... after the death of the victim." J.A. 8. In 1980, the court followed its finding with the statement of facts quoted above on pp. 6-7.[7] J.A. 12-14.

After hearing additional evidence in mitigation at the 1980 proceeding, the trial judge concluded "that there are no mitigating circumstances." J.A. 15. He thereupon resentenced Mr. Jeffers to

[7]The court based its "grave risk" conclusion on the jury's conviction of Mr. Jeffers of assaulting Ms. Van Der Veer by pointing a gun at her when she returned to the motel room. J.A. 6, 14.

die. J.A. 16.

C. Proceedings in the Arizona Supreme Court

On direct appeal, the Arizona Supreme Court affirmed Mr. Jeffers' convictions. State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105 (1983). J.A. 17. With regard to his death sentence, the court reversed the trial court's determination that Mr. Jeffers "knowingly created a grave risk of death to another person,"[8] and also reversed the trial court's conclusion that the defendant "committed the offense in an especially ... cruel ... manner:"

> [T]he element of cruelty was not proven. There was no evidence that the victim suffered any pain. It appears

[8]The court noted that its "grave risk" decisions involved "indiscriminate attacks in which the murderous act itself [had] put others in a danger zone, such as bombing an inhabited building" and refused to "stretch the statute to the extreme length" to which the trial court had stretched it. J.A. 58-59.

> from the record that after the injection of heroin, the victim lost consciousness and never regained it before she died. Therefore, the victim experienced no pain or mental suffering and the murder was not 'cruel' for purposes of A.R.S. § 703(F)(6).

J.A. 60.

Coming to the last remaining basis on which it could sustain Mr. Jeffers' death sentence, the Arizona Supreme Court noted that the "sentencing judge apparently based his finding that the murder was 'especially heinous ... and depraved' on Doris [Van Der Veer's] testimony that appellant strangled the victim while she was totally unable to resist, beat the dead victim about the face and reviled her" and on "appellant's [manner of] disposing of the body." J.A. 60-61. Foreswearing reliance on the latter factor -- on which, the supreme court acknowledged, the trial court "largely"

had relied -- the supreme court concluded that "the events surrounding the murder itself support the trial court's finding that the murder was 'especially heinous ... and depraved.'" J.A. 61-62. In reaching this conclusion, the court referred to dictionary definitions of "heinous" as "'hatefully or shockingly evil; grossly bad'" and of "depraved" as "'marked by debasement, corruption, perversion or deterioration.'" It noted two factors that its recent decision in State v. Gretzler, 135 Ariz. 42, 659 P.2d 1 (1983), had extracted from previous cases and identified as ones "such as" those that capital sentencing judges could consider (but need not rely on): "the infliction of gratuitous violence on the victim" and "the apparent relish with which the defendant commits the murder." It then concluded that Mr. Jeffers' words

and actions at the time of the killing "establish that the offense was committed in an especially heinous and depraved manner." J.A. 60-63.

After reviewing the evidence in mitigation -- inter alia, provocation, emotional stress, and intoxication -- the Arizona Supreme Court replaced the trial court's "no mitigating circumstances" finding with the finding that Mr. Jeffers had shown "no mitigating factors sufficiently substantial to ... outweigh the aggravating circumstance[]." J.A. 66. It rejected Mr. Jeffers' Godfrey challenge to the "heinous, cruel or depraved" aggravating circumstance, finding that Gretzler and cognate case law had narrowed the statutory phrase by "limit[ing] its application to cases which stand apart from the norm," J.A. 64, and emphasizing its insistence "that

the murder be especially cruel or especially depraved before this section would apply," J.A. 63 (emphasis in original). It thus affirmed Mr. Jeffers' death sentence.

D. Federal Habeas Corpus Proceedings

Mr. Jeffers' sought federal habeas corpus relief, alleging that Arizona's "interpretation" of the "especially heinous ... or depraved" aggravating circumstance "is unconstitutionally overbroad and vague and permits the arbitrary imposition of the death penalty." First Amended Petition, at 17. The district court rejected this contention. Jeffers v. Ricketts, 627 F. Supp. 1334, 1359-60 (D. Ariz. 1986).

In the Court of Appeals, Mr. Jeffers argued that his challenge to the "especially heinous" circumstance

encompassed three questions: Whether the words of the statute are unconstitutionally vague and overbroad on their face (citing Godfrey v. Georgia, 446 U.S. at 428-29); whether the Arizona Supreme Court had failed to "consistently define[the statute] by 'clear and objective standards' that 'provide specific and detailed guidance' that makes 'rationally reviewable the process for imposing a sentence of death'" (citing id. at 428); and whether the statute was "applied to the capital defendant ... in an overly broad manner" (citing id. at 432). Opening Brief of Appellant, at 51-52. Mr. Jeffers emphasized that he was not inviting the court to express a "'subjective opinion'" about which cases are and are not "especially heinous or depraved" but rather to determine whether Arizona's interpretation of the

circumstance "gives [a] 'principled way to distinguish this case, in which the death penalty was imposed, from the many in which it was not.' Godfrey [v. Georgia], 446 U.S. at 432." Appellant's Reply Brief, at 29.

Because the Ninth Circuit had earlier ruled that the "especially heinous" circumstance is neither void on its face (inasmuch as "'the Arizona Supreme Court need not construe the statute open-endedly'") nor void as applied in cases in which "cruelty" is found (on the ground that the victim "suffered greatly" before dying), the Court of Appeals could not accept Mr. Jeffers' argument "that the statute is void on its face." Jeffers v. Ricketts, 832 F.2d 476, 482-86 (9th Cir. 1987) (quoting Chaney v. Lewis, 801 F.2d at 1191, 1193, 1195 (9th Cir. 1986), cert. denied, 481

U.S. 1023 (1987)). It noted, however, that "'[h]einous' and 'depraved' are inherently more difficult terms to define than is 'cruel,'" and it sustained Mr. Jeffers' "as applied" attack on the "heinous ... or depraved" part of the circumstance. 832 F.2d at 482-83. Comparing the definition of those terms that was applied in Mr. Jeffers' and in other Arizona cases, the court concluded that the "relish" and "gratuitous violence" factors to which the Arizona Supreme Court had referred in affirming his death sentence were so highly "subjective" and so lacking in "meaningful sense" that they provided no "'principled way to distinguish this case, in which the death penalty was imposed from the many cases in which it was not.'" 832 F.2d at 484-85 (quoting Godfrey v. Georgia, 446 U.S. at 433).

Judge Wilson dissented. He found that Arizona's "statutory definition" of the "heinous ... or depraved" circumstance was constitutionally sufficient and that a "'rational factfinder'" could determine that Mr. Jeffers' case fell within that definition. 832 F.2d at 487-88 (Wilson, J., dissenting) (quoting Jackson v. Virginia, 443 U.S. 307, 313 (1979)).

The State thereupon filed a Petition for Rehearing and Rehearing En Banc, for the first time raising a "question regarding the proper standard for reviewing state court findings of aggravating circumstances." Id. at 2. The panel deferred ruling on the State's request "pending further decision of this court, sitting en banc in Adamson v. Ricketts." Mar. 30, 1988 Order, at 1.

On December 22, 1988, the en banc court in Adamson concluded that the

constitutional defect that the Jeffers majority had found in Arizona's application of the "especially heinous ... or depraved" component in Mr. Jeffers' case pervaded the Arizona courts' construction of that component in Arizona death cases as a whole. Adamson v. Ricketts, 865 F.2d 1011, 1029-39 (9th Cir. 1988) (en banc). The court discerned three problems with Arizona's construction:

> First, a broad range of definitions ha[s] been provided for the terms 'heinous' ... and 'depraved,' each of which tends to employ terms or phrases as prone to subjectivity and ambiguity as those they were meant to define. Second, the Arizona courts have not restricted the creation of new definitions and factors that could constitute an (F)(6) finding. Third, even the most concrete of those definitions have been inconsistently applied.

Adamson v. Ricketts, 865 F.2d at 1031.

Following announcement of Adamson, the Jeffers' panel denied the State's

rehearing petition. Because "[t]he full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion," the court also denied rehearing en banc. Apr. 14, 1989 Order, at 1.

SUMMARY OF ARGUMENT

The Court's Eighth Amendment decisions dictate the outcome of this case. Since Furman v. Georgia, 408 U.S. 238 (1972), the Court has insisted that narrowing capital-sentencing discretion "is a fundamental constitutional requirement," Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988), that in States like Arizona, which use aggravating circumstances to serve the narrowing function, mandates that each circumstance "provide a '"meaningful basis for distinguishing the

few cases in which [the death penalty] is imposed from the many cases in which it is not."'" Godfrey v. Georgia, 446 U.S. 420, 427 (1980) (citations omitted).

Petitioner argues that a State (as did Arizona here) may rely on an undelimited determination that a killing is "especially heinous ... or depraved" to serve that constitutional narrowing requirement, and that the federal courts must confine their review of an "especially heinous ... or depraved" determination to a "rational factfinder" analysis. The effect of Arizona's arguments is to overrule Maynard v. Cartwright and Godfrey v. Georgia. For "an ordinary person could honestly believe that every justified, intentional taking of human life is 'especially heinous,'" Maynard v. Cartwright, 108 S. Ct. at 1859, hence a

"rational factfinder" test necessarily would approve every application of the "especially heinous" and cognate circumstances, including the applications the Court disapproved in Godfrey and Maynard. The law of the Eighth Amendment is otherwise.

The Constitution requires, first, that aggravating circumstances provide a "principled means ... to distinguish those murders [that receive[] the [death] penalty from those that d[o] not." Maynard v. Cartwright, 108 S. Ct. at 1858. On their faces, the words "especially heinous ... or depraved" provide no such narrowing principle. Nor, as the Court of Appeals in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc), concluded, following a comprehensive review of Arizona cases, is that defect cured by Arizona's

construction of the words, which authorizes sentencers to rely upon a constantly expanding pastiche of synonyms and factors, none of which, the Arizona Supreme Court has ruled, is either sufficient to require or necessary to support an "especially heinous ... or depraved" finding. As in Maynard, the construction of the circumstance runs afoul of the Constitution, because the Arizona courts, although considering numerous factors "to be relevant ... [have] 'refused to hold that any one of those factors must be present for a murder to satisfy [the] aggravating circumstance.'" Maynard v. Cartwright, 108 S. Ct. at 1857 (emphasis in original) (citation omitted).

The Eighth Amendment requires, second, that the state courts "have applied in this case a constitutional construction"

of the "especially heinous ... or depraved" circumstance. Godfrey v. Georgia, 446 U.S. 420, 432 (1980). In order to justify Mr. Jeffers' death sentence on the basis of that circumstance, the Arizona courts simply dressed up the mens and actus rea accompanying all unjustified, premeditated first degree murders in the terms "relish" and "gratuitous violence." Because those factors, and the elements of murder they adorn, "cannot be said to ... reflect[] a consciousness materially more 'depraved'" than that characterizing any first degree murder so as to provide a "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not," Godfrey v. Georgia, 446 U.S. at 433, Mr. Jeffers' death sentence runs afoul of the rule of Godfrey.

The State's efforts to distract the Court from the dictates of Maynard and Godfrey with a spurious "standard of review" argument are unavailing. First, the State unavoidably concedes that the standard of review applied below properly applies to the Maynard-Adamson ground of relief, then tries to divert the Court from considering that ground on the mistaken bases that the Court of Appeals did not rely on it and that this Court accordingly cannot address it. But see Smith v. Phillips, 455 U.S. 209, 215, n.6 (1982). Second, Arizona conflates the "rational factfinder" standard of review that applies to a state court's finding under the "especially heinous ... and depraved" circumstance, insofar as it is a matter of state law, with the distinct standard of review that applies when the

circumstance is used by the State to satisfy the "constitutionally necessary narrowing function," Pulley v. Harris, 465 U.S. 37, 50 (1984). Because the latter issue is a federal constitutional issue requiring independent federal judicial consideration, and because Arizona avoids that issue only by disregarding the holdings of Godfrey and Maynard that the words "especially heinous ... or depraved," standing alone, are not constitutionally sufficient, respect for reason and precedent require rejection of the State's argument.

ARGUMENT

I. INTRODUCTION

Settled Eighth Amendment principles resolve this case. "Since Furman[v. Georgia, 408 U.S. 238 (1972)], [the Court's] cases have insisted that the

channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). In States like Arizona that rely on aggravating circumstances to accomplish this "constitutionally necessary narrowing function," Pulley v. Harris, 465 U.S. 37, 50 (1984), those circumstances, "must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" Lowenfield v. Phelps, 108 S. Ct. at 554 (quoting Zant

v. Stephens, 462 U.S. 862, 877 (1983)).[9] As Justice White originally described the function of an aggravating circumstance: "the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate." Gregg v. Georgia, 428 U.S.

---

[9]Tracking the Georgia model, Arizona in the wake of Furman chose not to narrow the scope of its first-degree murder provision, which encompasses a broad category of premeditated and felony homicides, and instead "act[ed] ... to narrow the class of murders subject to capital punishment by specifying [seven] statutory aggravating circumstances, one of which must be found ... to exist beyond a reasonable doubt" at the sentencing phase "before a death sentence can ever be imposed." Gregg v. Georgia, 428 U.S. 153, 196-97 (1976) (opinion of Stewart, Powell and Stevens, JJ.). See Ariz. Rev. Stat. §§ 13-703(E) and (F); Arizona v. Rumsey, 467 U.S. 203, 210 (1984). Mr. Jeffers' death sentence rests exclusively on the "heinous ... or depraved" finding. If "that ... aggravating circumstance [is] struck down, no valid statutory aggravating circumstance [would] remain[]." Barclay v. Florida, 463 U.S. 939, 969 n.16 (1983) (Stevens, J., concurring).

at 222 (White, J., concurring).[10]

A State's reliance on "statutory aggravating circumstances [to] play [this] constitutionally necessary function" entails

> the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of Furman itself. For a system "could have standards so vague that they would fail adequately to channel ... sentencing decision patterns ... with the result

---

[10] Accord, e.g., Lowenfield v. Phelps, 108 S. Ct. at 554; McCleskey v. Kemp, 481 U.S. 279, 305 (1987); Barclay v. Florida, 463 U.S. 939, 960 (1983) (Stevens, J., concurring). What sometimes is denominated here simply as the "narrowing function" is actually two requirements: The circumstance must "circumscribe the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. at 878, so that it encompasses something less than "every unjustified, intentional taking of life," Maynard v. Cartwright, 108 S. Ct. at 1859; and the circumstance must achieve that winnowing by means of some "objective, evenhanded and substantively rational" principle, "rather than [by means of] 'caprice ... emotion'" or discrimination, Zant v. Stephens, 462 U.S. at 879; Godfrey v. Georgia, 446 U.S. at 433 (quoting Gardner v. Florida, 430 U.S. 349, 350 (1978) (plurality opinion)). See California v. Brown, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring).

> that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur."

Zant v. Stephens, 462 U.S. at 876-77 (quoting Gregg v. Georgia, 428 U.S. 153, 195 n.46 (1976) (opinion of Stewart, Powell and Stevens, JJ.)). Each aggravating circumstance "must, in short, provide a '"meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not."'" Godfrey v. Georgia, 446 U.S. at 427 (quoting Gregg v. Georgia, 428 U.S. at 188 (opinion of Stewart, Powell and Stevens, JJ.) (quoting Furman v. Georgia, 408 U.S. at 313 (White, J., concurring))).

As did the dissenting judge below, Arizona argues here that a State may rely on an undelimited determination that a killing is "especially heinous ... or

depraved" to serve the constitutionally necessary narrowing function, and that then the federal courts must restrict their review of the "especially heinous ... or depraved" determination to the rational factfinder" standard of Jackson v. Virginia, 443 U.S. 307, 313 (1979). See 832 F.2d at 488 (Wilson, J., dissenting); Petitioner's Brief, at 11-13. We will detail subsequently the specific errors in these arguments; for now, we note only that their joint effect is to overrule Maynard v. Cartwright and Godfrey v. Georgia. For, as those cases recognize, "an ordinary person could honestly believe that every unjustified, intentional taking of life is 'especially heinous,'" Maynard v. Cartwright, 108 S. Ct. at 1858, 1859; see Godfrey v. Georgia, 446 U.S. at 428-29 ("A person of ordinary sensibility could fairly

characterize every murder as 'outrageously or wantonly vile, horrible and inhuman'"); Gregg v. Georgia, 428 U.S. at 201 (opinion of Stewart, Powell and Stevens, JJ.) ("It is, of course, arguable that any murder involves depravity of mind"); and accordingly, under Jackson v. Virginia's "rational factfinder" test, a state-court application of the "especially heinous ... or depraved" circumstance could never be found federally unconstitutional.

The law of the Eighth Amendment is otherwise. To satisfy the Eighth Amendment, there must be a "'"meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."'" Godfrey v. Georgia, 446 U.S. at 427 (quoting Gregg v. Georgia, 428 U.S. at 188 (opinion of Stewart, Powell and

Stevens, JJ.) (quoting Furman v. Georgia, 408 U.S. at 313 (White, J., concurring))).

The application of this command to a particular case requires a federal court to answer two questions relating to a State's use of the "especially heinous ... or depraved" circumstance. First, does the construction of the circumstance that the state courts employ in culling death from life cases provide a "principled means ... to distinguish those that receive[] the death penalty from those that d[o] not?" Maynard v. Cartwright, 108 S. Ct. at 1858.[11] Second, if so, "whether in light of the facts and circumstances of the murder[] that [the defendant] was convicted of

[11] Accord Adamson v. Ricketts, 865 F.2d 1011, 1029-30 (9th Cir. 1988) (en banc); Cartwright v. Maynard, 822 F.2d 1477, 1485 (10th Cir. 1987) (en banc), aff'd, 108 S. Ct. 1853 (1988).

committing, the [state courts] can be said to have applied in this case a constitutional construction ... ?" Godfrey v. Georgia, 446 U.S. at 432.[12]

We show in Parts in II(A) and (B) below that Maynard and Godfrey, respectively, invalidate Mr. Jeffers' death sentence under these analyses. In Part III we deal with the State's attempt to obscure these conclusions by an incomplete and inapposite "standard of review" analysis.

[12] Accord Barclay v. Florida, 463 U.S. 939, 948 n.5 (1983) (plurality opinion); Newlon v. Armontrout, 885 F.2d 1328, 1333-35 (8th Cir. 1989); Proffitt v. Wainwright, 685 F.2d 1227, 1262-65 (11th Cir. 1982).

II. MAYNARD AND GODFREY DICTATE THE COURT OF APPEALS' CONCLUSION THAT THE ARIZONA "ESPECIALLY HEINOUS ... OR DEPRAVED" CIRCUMSTANCE FAILED TO SERVE ITS CONSTITUTIONAL NARROWING FUNCTION

A. The Arizona Supreme Court's Construction of the "Especially Heinous ... or Depraved" Circumstance Runs Afoul of the Eighth Amendment Rule of Maynard

In Maynard v. Cartwright, the Court upheld a ruling of the United Stat Court of Appeals for the Tenth Circuit "that the words 'heinous,' 'atrocious,' and 'cruel'" in Oklahoma's capital-sentencing statute "d[o] not on their face offer sufficient guidance to the [sentencer] to escape the strictures of [the] judgment in Furman" and "that the Oklahoma [courts'] construction of the aggravating circumstance was 'unconstitutionally vague:'"

> [The Tenth Circuit's] reading of the [state] cases was that while the Oklahoma court had considered the attitude of the killer, the manner of the killing, and the suffering of the victim to be relevant and sufficient to support the aggravating circumstance, that court had "refused to hold that any one of those factors must be present for a murder to satisfy this aggravating circumstance." Rather, the Oklahoma court simply had reviewed all of the circumstances of the murder and decided whether the facts made out the aggravating circumstance.

Maynard v. Cartwright, 108 S. Ct. at 1857 (quoting Cartwright v. Maynard, 822 F.2d 1477, 1483, 1492 (10th Cir. 1987) (en banc) (emphasis in original)). Because the Tenth Circuit had "with some care, reviewed the evolution in the interpretation of the 'especially heinous, atrocious, or cruel' aggravating circumstance by the Oklahoma Court of Criminal Appeals," and because this Court "normally defer[s] to Courts of Appeals in their interpretation of state law," the Court saw "no reason not to accept the Court of Appeals' statements about

state law in this case." Maynard v. Cartwright, 108 S. Ct. at 1857. Testing this body of state law under Godfrey and Furman, the Court agreed with the Tenth Circuit that it was deficient.

The present case is indistinguishable from Maynard. In Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) -- following which the panel below denied the State's rehearing petition in Mr. Jeffers' case -- the en banc Court of Appeals for the Ninth Circuit, without dissent on this point,[13] concluded after a comprehensive analysis of all the Arizona cases that Arizona's construction of the words "heinous" and "depraved" does not satisfy Furman's limiting and

[13]Four members of the en banc court dissented from the majority's similar conclusion in regard to the Arizona courts' application of the "cruel" component of the (F)(6) aggravating circumstance. See Adamson v. Ricketts, 865 F.2d at 1055-58 (Brunetti, J., concurring and dissenting).

channeling requirement and has produced unconstitutionally random and inconsistent results. Id. at 1031-38. Like the en banc Tenth Circuit in Cartwright, the en banc court in Adamson found that words as vague as "especially heinous ... or depraved" are not constitutionally salvaged by a definitional strategy that enumerates numerous factors which may be relied upon, but does not "state[] what specific factors are necessary" or "include any instructions to limit future review to the enumerated factors." Id. at 1033.

Given the nearly point-for-point identity of Oklahoma's pre-Cartwright construction of that State's "especially heinous" aggravating circumstance -- as described in the Tenth Circuit's decision in Cartwright -- and Arizona's construction of its analogous provision --

as described in painstaking detail in Adamson -- the Court's affirmance in the former case dictates a like result here.[14]

---

[14]Arizona contends that the court below did not premise its decision on the Maynard-Adamson ground for relief and that the ground is not before this Court because Mr. Jeffers, although he won all the relief that he sought below with regard to the "especially heinous ... or depraved" circumstance, did not cross-petition for certiorari. See Petitioner's Brief, at 7 & n.2. But see R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 382 (6th ed. 1986) (citing decisions) (certiorari does not lie to review decisions in which the petitioning party prevailed). The State is in error.

First, Arizona is mistaken about the nature of the attack on the "especially heinous" circumstance that the opinion below rejected. Contrary to the State's assertion in its question presented, the court below nowhere "determined that a state court has adopted a constitutionally narrow definition of [the "especially heinous"] aggravating circumstance," but only that a state court could do so were it so minded. Thus, just as this Court did in Gregg v. Georgia, 428 U.S. at 201-02, and Proffitt v. Florida, 428 U.S. 242, 255-56 (1976) -- without in any way foreclosing the later decisions in Godfrey and Maynard -- the panel below simply ruled that it would not strike down the statute on its face without first examining whether the Arizona courts' application of the statute cured its facial infirmities. See 832 F.2d at 482-83. The court below accordingly foreclosed no part of

As Maynard observes, words like "heinous" and "depraved" "d[o] not on their face offer sufficient guidance to the jury to escape the strictures of our judgment in Furman v. Georgia." Maynard v. Cartwright, 108 S. Ct. at 1859. See also Newlon v. Armontrout, 885 F.2d

---

Mr. Jeffers' challenge to the Arizona courts' application of the circumstance -- to the contrary, the court granted him relief on that challenge -- and no part of that challenge is foreclosed here, even under the State's curious theory that this Court may not consider arguments that the court below rejected.

Second, by holding the State's rehearing and rehearing en banc requests pending its decision in Adamson, and then denying them, the Court of Appeals did consider the Adamson analysis as the basis for its final judgment granting Mr. Jeffers relief.

Finally, regardless of the ground on which the Court of Appeals ruled, "[r]espondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted." Smith v. Phillips, 455 U.S. 209, 215 n.6 (1982). Accord, e.g., Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842 n.7 (1985); Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1978); United States v. New York Telephone Co., 434 U.S. 159, 166 n.8 (1977); R. Stern, E. Gressman & S. Shapiro, supra at 382.

1328, 1334 (8th Cir. 1989) ("Absent a clear limiting directive ... words [such as] 'depravity of mind' ... are not capable of objective determination").

Construction is accordingly necessary. And in Arizona a certain manner of construction has been tried. But that construction, based on the oft-emphasized disjunctive strategy of the "especially heinous ... or depraved" clause itself, is "so broad that it ... vitiate[s] the role of the aggravating circumstance in guiding sentencing ... discretion." McCleskey v. Kemp, 481 U.S. 279, 305 (1987).[15]

As did the Oklahoma Court of Criminal

---

[15]Emphasizing the disjunctive nature of the statute are, e.g., State v. Beaty, 158 Ariz. 232, 242, 762 P.2d 519, 529 (1988); State v. Wallace, 151 Ariz. 362, 366, 728 P.2d 232, 236-37 (1986); State v. Libberton, 141 Ariz. 132, 139, 685 P.2d 1284, 1291 (1984); State v. Richmond, 136 Ariz. 312, 319, 666 P.2d 57, 64 (1983).

Appeals' decisions under review in Maynard, (see Cartwright v. Maynard, 822 F.2d at 1487), the Arizona Supreme Court's decisions began the process of interpreting the "especially heinous" circumstance by quoting the Florida gloss on an "especially heinous" aggravating circumstance that this Court had found sufficient in Proffitt v. Florida, 428 U.S. 242, 256 (1976). As recited by the Arizona Supreme Court, that gloss provides that

> " .... heinous means extremely wicked or shockingly evil; ... [and] that atrocious means outrageously wicked and vile .... What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

State v. Watson, 120 Ariz. 441, 447, 586 P.2d 1253, 1259 (1978). Tracking the

Florida Supreme Court's quotation of Webster's definitions of "heinous" and "atrocious," the Arizona Supreme Court next -- in what remains its most frequently cited construction of the terms[16] -- recited Webster's definitions of "heinous" and "depraved:"

> The words 'heinous ... or depraved' have meanings that are clear to a person of average intelligence and understanding. Webster's Third New International Dictionary defines them as follows:
>
> heinous: hatefully or shockingly evil: grossly bad.
>
> ....
>
> depraved: marked by debasement, corruption, perversion or deterioration.

State v. Knapp, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977).

As eventually came to be the case in Oklahoma, however, Arizona's interpreta-

[16] See Appendix B, Tables B-1 (col. 5) and B-3.

tion did not follow the Florida approach of reading all parts of its definition conjunctively and in pari materia with the phrase "unnecessarily torturous to the victim."[17] Neither torture nor any other concrete set of facts was required by the case law to support a finding of heinousness or depravity. Rather, Arizona sentencers frequently have been upheld in finding the "especially heinous ... or depraved" circumstance to be present, notwithstanding the absence of any pain or torture to the victim, if they deem an offense to be, for example,

[17] See Proffitt v. Florida, 428 U.S. at 255 (discussing State v. Dixon, 283 So.2d at 9) (Florida construction approved because of its objective "unnecessarily torturous" requirement); Cartwright v. Maynard, 822 F.2d at 1487. See also Godfrey v. Georgia, 446 U.S. at 431 (Georgia's definition, the abandonment of which in that case led to the Court's reversal, required "that the word, 'torture,' must be constructed in pari materia with 'aggravated battery' so as to require evidence of serious physical abuse of the victim before death").

(1) "marked by debasement,"[18] "hatefully" or "shockingly evil,"[19] or "grossly bad;"[20] (2) "conscienceless or pitiless;"[21] (3) "unnecessary;"[22] (4)

---

[18]E.g., State v. Fulminante, 778 P.2d 602, 610 (Ariz. 1988); State v. Vickers, 129 Ariz. 506, 515, 633 P.2d 315, 324 (1981); State v. Ceja, 126 Ariz. 35, 40, 612 P.2d 491, 496 (1980). See also, e.g., State v. Beaty, 158 Ariz. 232, 242, 762 P.2d 519, 529 (1988) ("marked by corruption"); State v. Madsen, 125 Ariz. 346, 352, 609 P.2d 1046, 1052 (1980) ("marked by perversion").

[19]E.g., State v. Fulminante, 778 P.2d 602, 620, 621 (1988); State v. Beaty, 158 Ariz. 232, 242, 762 P.2d 519, 525 (1988); State v. Carriger, 143 Ariz. 142, 150, 692 P.2d 991, 1009 (1984); State v. Zaragoza, 135 Ariz. 63, 69, 659 P.2d 22, 28 (1983); State v. Ricky Tison, 129 Ariz. 526, 543, 633 P.2d 335, 352 (1981); State v. Ceja, 126 Ariz. 35, 39-40, 612 P.2d 491, 496 (1980).

[20]State v. James, 141 P.2d 141, 147, 685 P.2d 1293, 1299 (1984).

[21]E.g., State v. B. Smith, 146 Ariz. 491, 505, 707 P.2d 289, 301 (1985); State v. Lujan, 124 Ariz. 365, 392, 604 P.2d 629, 636 (1979).

[22]E.g., State v. Martinez-Villareal, 145 Ariz. 441, 461, 702 P.2d 670, 690 (1985). See e.g., State v. Harding, 141 Ariz. 492, 501, 687 P.2d 1247, 1256 (1984) ("senseless").

"especially,"[23] or "particularly"[24] "heinous ... or depraved" or "more heinous ... or depraved than usual;"[25] or (5) -- in the Arizona Supreme Court's second most frequently cited formulation -- if the courts conclude that the crime is characterized by any "additional"[26] acts or circumstances beyond the bare elements of first-degree murder that place the offense "above the norm of

---

[23]E.g., State v. Johnson, 147 Ariz. 395, 401, 710 P.2d 1050, 1056 (1985); State v. Lujan, 124 Ariz. 365, 373, 604 P.2d 629, 637 (1979).

[24]State v. Wallace, 160 Ariz. 424, 428, 773 P.2d 483, 487 (1989).

[25]State v. B. Smith, 146 Ariz. 491, 503, 707 P.2d 289, 301 (1985).

[26]E.g., State v. Correll, 148 Ariz. 468, 481, 715 P.2d 721, 734 (1986); State v. B. Smith, 146 Ariz. 491, 503, 707 P.2d 289, 301 (1985); State v. Ceja, 115 Ariz. 413, 416, 565 P.2d 1274, 1277 (1977).

first degree ... murders."[27] Yet,

[27] State v. Beaty, 158 P.2d 232, 247, 762 P.2d 519, 534 (1988); State v. Correll, 148 Ariz. 468, 485, 715 P.2d 721, 738 (1986). Accord, e.g., State v. Harding, 137 Ariz. 278, 295, 670 P.2d 383, 400 (1983) ("apart from the usual or norm"); State v. Richmond, 136 Ariz. 312, 314, 666 P.2d 57, 64 (1983) ("'apart from the normal first degree murder'"); State v. Jeffers, 135 Ariz. at 430, 661 P.2d at 1131 ("cases which stand apart from the norm"); State v. Ortiz, 131 Ariz. 195, 210, 639 P.2d 1020, 1035 (1982) ("more heinous and depraved than the norm of first degree murders"); other decisions collected in Appendix B, Table B-1 (col. 6). Compare Eddings v. State, 616 P.2d 1159, 1167 (Okla. Cr. App. 1980), rev'd on other grounds, 455 U.S. 104 (1982) (quoted in Cartwright v. Maynard, 822 F.2d at 1487) ("the Legislature . . . intended to reach killings which are 'out of the ordinary'"). Arizona decisions, in addition to Jeffers itself, in which the court disjoined torture, or "cruelty," from the rest of the (F)(6) provision and found the (F)(6) factor present notwithstanding a finding that the victim did not suffer physically or mentally include, e.g., the Wallace, Richmond, Woratzeck, Zaragoza, Ortiz, and Ceja cases cited supra notes 18, 19, 24, 26 and above. Compare Godfrey v. Georgia, 446 U.S. at 454 (White, J., dissenting) (noting that the Georgia Supreme Court "expressly rejected an analysis that would apply the ["outrageously vile" and "torture and aggravated battery" portions of Georgia's] provision disjunctively, ... an analysis that, if adopted, would arguably be assailable on constitutional grounds"). Appendix B, Table B-1 (col 4) illustrates the catch-all nature of the "heinous ... or depraved" components of the (F)(6) aggravating circumstance once those

although the Arizona Supreme Court from time to time relies on each of these concepts as the basis for a "heinous ... or depraved" finding and a death sentence, it has never ruled that any one of them defines a condition or action that must be present to justify an "especially heinous ... or depraved" finding.

Indeed, State v. Gretzler, 135 Ariz. 42, 659 P.2d 1 (1983), rules precisely to the contrary. There, the Arizona Supreme Court "summar[ized] ... the law which

components are unlinked from cruelty, or torture. For although no Arizona trial court ever, and the Arizona high court only once, has found "cruelty" present when "heinousness" and/or "depravity" was not found, those courts frequently base death sentences on "heinous and/or depraved" findings when "cruelty" is not present. It is manifest, therefore, that the "mental or physical" pain meaning of "cruel" in Arizona lies at the "core" of all three components of the (F)(6) circumstance, but that Arizona's interpretation of the "heinous" and "depraved" components encompasses much else besides.

has been developing in th[is] area" and formalized the multi-factor approach described above. 135 Ariz. at 51, 659 P.2d at 9. The Gretzler court reiterated Webster's "definitions of the words heinous ... or depraved," emphasized the disjunctive nature of (F)(6)'s three components, acknowledged that numerous "factors" previously had led the Court "to a finding of heinousness or depravity" in the past, and listed five such factors -- the "apparent relishing" of murder, "gratuitous violence," "needless mutilation of the victim," "the senselessness of the crime," and the "helplessness of the victim." 135 Ariz. at 52-53, 659 P.2d at 10-11. But the court made plain that no one of the five factors nor any other factor was sufficient in itself to require a heinousness or depravity finding or

necessary in itself to support one. Those factors, the court insisted, "in isolation, need not always lead to a holding that the crime is heinous or depraved;" and, on the other hand, such a finding may be made in the absence of any of the factors, as long as other "circumstances such as the specific factors discussed above [are present and serve to] separate the crime from the 'norm' of first degree murders ...." 135 Ariz. at 53, 659 P.2d at 12 (emphasis added).

If any single "standard" emerges from Gretzler, it is this last-mentioned formula with which the court both began and ended its discussion. As the court concluded, reprising its many prior and foreshadowing its many subsequent repetitions of the formulation: "'First degree murder is by its nature willful,

cruel and repugnant.'" Hence, to qualify as "especially heinous ... or depraved," "'the facts of th[e] case [must] set it "apart from the norm of first degree murders."'" Id. (quoting State v. Steelman, 126 Ariz. 19, 26, 612 P.2d 475, 482 (1980) (quoting State v. Brookover, 124 Ariz. 38, 41, 601 P.2d 1322, 1325 (1979))).

Or, as the formula subsequently has been expressed:

> All first degree murders are to some extent heinous, cruel or depraved: therefore, to warrant the imposition of the death penalty, a murder must be more heinous ... or depraved than usual .... [T]o uphold this aggravating circumstance, we must find that defendant murdered ... in a manner that not only was heinous, cruel or depraved, but that was especially so.[28]

---

[28] State v. B. Smith, 146 Ariz. 491, 503, 707 P.2d 289, 301 (1985) (emphasis in original). Accord, e.g., State v. Wallace, 160 Ariz. 424, 428, 773 P.2d 983, 987 (1989) (the murder must be "particularly disturbing"); State v. Vickers, 159 Ariz. 532, 546, 768 P.2d 1177, 1191 (1989); State v. Jeffers, 135 Ariz. at 430, 661 P.2d at 1131.

The constitutional defect in this approach is the same one that led to the result in Maynard. For Arizona's, like Oklahoma's, reliance on the "contention that the addition of the word 'especially'" -- or 'abnormally' or 'unusually' --

> somehow guides the [sentencer's] discretion, even if the term "heinous" does not, is untenable. To say that something is "especially heinous" merely suggests that the ... murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every

---

The continued currency of the "above the norm" and allied formulations is revealed by the frequency with which the Arizona Supreme Court in post-Gretzler decisions has affirmed "heinous or depraved" findings on this basis without citing Gretzler or even any of its factors. E.g., State v. Williams, 1987 W.L. 878 (Ariz. Oct. 8, 1987); State v. Moorman, 154 Ariz. 578, 587, 744 P.2d 679, 688 (1987); State v. Graham, 135 Ariz. 209, 212, 660 P.2d 460, 463 (1983); State v. Zaragoza, 135, Ariz. 63, 70, 659 P.2d 22, 29 (1983). See also, e.g., State v. Poland, 144 Ariz. 388, 405, 698 P.2d 183, 200 (1985) (relying on dictionary definitions but not Gretzler). See generally Appendix B, Tables B-1 (cols. 5-7) and B-3.

unjustified, intentional taking of human life is "especially heinous."

Maynard v. Cartwright, 108 S. Ct. at 1859. Accord Proffitt v. Wainwright, 685 F.2d 1227, 1264-65 n.57 (11th Cir. 1982) ("heinousness" standard is unconstitutional if it requires that the crime "be in some respect worse than others on average" but "fail[s] to indicate in what way the crime should be 'worse'").

The en banc Court of Appeals in Adamson noted three characteristics of the Arizona case law. Each is illustrated briefly below.

> First, a broad range of definitions ha[s] been provided for the terms "heinous" and ... "depraved," each of which tends to employ terms or phrases as prone to subjectivity and ambiguity as those they were meant to define. Second, the Arizona courts have not restricted the creation of new definitions and factors that could constitute an (F)(6) finding. Third, even the most concrete of those definitions have been inconsistently applied.

Adamson v. Ricketts, 865 F.2d at 1031.

Standing alone, there is nothing in Arizona's dictionary definitions -- for example, "shockingly evil" or "marked by corruption" -- or in the factors with which Gretzler illustratively supplemented those definitions: for example, "senselessness," "gratuitous violence," "relish," and "vile state of mind at the time of the murder"[29] -- that provides "any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously ... vile ....'" Godfrey v. Georgia, 446 U.S. at 428-29. See Proffitt v. Wainwright, 685 F.2d at 1264-65 n.57. Likewise,

---

[29] See, e.g., State v. LaGrand, 153 Ariz. 21, 36, 734 P.2d 563, 579 (1987); State v. McCall, 139 Ariz. 147, 161, 677 P.2d 920, 934 (1983).

every unjustified murder is by that fact alone "gratuitous" and never "sensible;" and no murderer who deliberated on the deed long enough to establish premeditation can ever be absolved of having relished the premeditated act.[30]

"Although oft-repeated" therefore, the Arizona Supreme Court's "list of amorphous terms and [its] definitional distinction[s] have failed to benefit the trier of fact in any meaningful way." Adamson v. Ricketts, 865 F.2d at 1032. "'Vague terms do not suddenly become clear when they are defined by reference to other vague terms.'" Id. at 1032 (quoting Cartwright v. Maynard, 822 F.2d

---

[30]In this last regard, recall Robert Franklin Godfrey's remark upon being arrested for killing his wife and mother-in-law: "I have been thinking about it for eight years. ... I'd do it again," Godfrey v. Georgia, 446 U.S. at 426, and William Thomas Cartwright's avowal "to 'get even' with the Riddles," Cartwright v. Maynard, 822 F.2d at 1488.

at 1489). Nor do they "narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. at 878.

Even were the synonyms and illustrative factors definitionally sufficient standing alone, these phrases do not stand alone; and they often are stood in for by an ever-expanding host of alternative and supplemental synonyms and factors. The Arizona Supreme Court repeatedly has confirmed that, although the factors listed in Gretzler "may lead to a finding of heinous or depraved," State v. Wallace, 151 Ariz. 362, 367, 728 P.2d 232, 237-38 (1986) (emphasis added), they as easily may not. In case after case, they have not led to such a

finding.[31] Moreover, the Arizona Supreme

[31] In the following first-degree murder decisions, among many others, "heinous and depraved" findings were either reversed or not made, although the Arizona Supreme Court expressly found the highlighted Gretzler factor present:

GRATUITOUS VIOLENCE. E.g., State v. Carr, 154 Ariz. 468, 469, 743 P.2d 1386, 1387 (1987) (defendant killed victim with stab wound to neck, then stabbed victim repeatedly in the back, including one 15" gash; trial court found that offense was not "heinous and depraved;" Mr. Jeffers has lodged the unpublished sentencing order in this case with the Court); State v. R.D. Smith, 138 Ariz. 79, 84-86, 673 P.2d 17, 22-24) (1983) (defendant strangled rape victim, held her down while codefendant stabbed her, then crushed victim with rocks; "heinous and depraved" finding reversed); State v. Richmond, 136 Ariz. 312, 315, 319, 666 P.2d 57, 60, 64 (1983) (defendant beat robbery victim unconscious with fists, then dropped "large rocks" on him, then drove a car over the "helpless[]" victim's head and a second time over his body, crushing both; "heinous and depraved" finding reversed by majority of concurring justices); State v. Blazak, 131 Ariz. 598, 600, 643 P.2d 694, 700 (1983) (defendant shot bartender four times at close range during a robbery, then shot two nearby patrons, killing one; "heinous and depraved" finding reversed); State v. Arnett, 125 Ariz. 201, 202, 608 P.2d 778, 779 (1980) (defendant shot victim four times with an M-1 carbine, "any one of which [shots] could have been fatal in itself;" "heinous and depraved" not found); State v. Watson, 120 Ariz. at 447-48, 586 P.2d at 1259-60 (defendant shot victim four times, the fourth while victim was lying on ground face down;

"heinous and depraved" finding reversed). See generally decisions surveyed in Adamson v. Ricketts, 865 F.2d at 1038; Jeffers v. Ricketts, 832 F.2d at 485.

RELISHING THE KILLING: E.g., State v. Rockwell, 161 Ariz. 5, 8 & n.2, 775 P.2d 1069, 1072 & n.2, 1076 (1989) (after marching robbery victim to filling station rest room at gunpoint and making helpless victim kneel in front of the toilet before being shot "execution-style," defendant "boasted" and "bragged" to friends about the killing in order to "project[] a macho image;" "heinous and depraved" not found by trial court); State v. Graham, 135 Ariz. 209, 212, 660 P.2d 460, 463 (1983) ("to impress" his friends, defendant described how the robbery victim "'squealed like a rabbit;'" "heinous and depraved" finding reversed) [compare to Rockwell and Graham: State v. Martinez-Villareal, 145 Ariz. 441, 450-51 & n.3, 702 P.2d 670, 679-80 & n.3 (1985) ("heinous and depraved" finding affirmed because, after killing the robbery victim, defendant told a friend that the act proved his "manliness" and "machismo;" statement relied upon to uphold "heinous and depraved" finding)]; State v. R.L. Smith, 141 Ariz. 510, 511-12, 687 P.2d 1265, 1266-67 (1984) (defendant "senseless[ly]" killed robbery victim who "offered no resistance [and] ... backed away" when defendant cocked trigger; afterward, "Smith laughed and joked about the murder;" "heinous and depraved" finding reversed) [compare to R.L. Smith: State v. James, 141 Ariz. 141, 147, 685 P.2d 1293, 1299 (1984) ("heinous and depraved" finding affirmed because defendant laughed and joked about robbery-murder afterwards)]; State v. R.D. Smith, 138 Ariz. 79, 85-86, 673 P.2d 17, 23-24 (1983) (facts also included in codefendant's

case, State v. Lambright, 138 Ariz. 63, 66-67, 673 P.2d 1, 4-5 (1983)) (after admittedly raping a kidnap victim "repeatedly," strangling her, holding her down while a codefendant stabbed her, then crushing victim's head with rocks, defendant "participate[d] in the macabre celebration of the killing during which the group played the song 'We Are the Champions;'" "heinous and depraved" finding reversed); State v. Madsen, 125 Ariz. 346, 352-52, 609 P.2d 1046, 1052-53 (1980) (after killing his wife and collecting the insurance money, defendant told a friend envious of his wealth, "It's easy to get money, you just blow someone away and collect the insurance;" "heinous and depraved" finding reversed).

NEEDLESS MUTILATION: E.g., State v. Cruz-Mata, 138 Ariz. 370, 371-72, 674 P.2d 1368, 1369-70 (1983), and State v. Montes, 136 Ariz. 491, 492-93, 498, 667 P.2d 191, 192-93, 198 (1983) (Cruz-Mata, Montes and third defendant (Sapien) forced victim, who had offered the three a ride, off the road, robbed him, bound him, stabbed him 29 times, and cut off his genitals; "heinous and depraved" not found in any of three cases; sentencing orders and presentence reports in three cases lodged with Court).

HELPLESSNESS: E.g., State v. B. Smith, 146, Ariz. 491, 503-09, 707 P.2d 289, 301-02 (1985) (robbery victim "helpless" when killed; "heinous and depraved" finding reversed); State v. Poland, 144 Ariz. 388, 393, 698 P.2d 183, 188 (1985) (unconscious victims sealed in canvas sacks weighted with rocks and thrown into Lake Mead to drown; "heinous and depraved" finding reversed); State v. Brookover, 124 Ariz. at 39, 601 P.2d at 1323 (defendant shot robbery victim once; then while victim was on floor asking for mercy, defendant said "don't worry, buddy, it'll be over

Court has insisted that there are "[n]umerous factors [that] can be considered in making a finding of depravity [which] include" the Gretzler factors, but also include many other factors bounded only by the requirement that they be "such things as" the Gretzler factors, or that they "in some other way ... set [the defendant] apart from the 'norm' of first degree murderers," or that they likewise

soon," and shot victim a second time; "heinous and depraved" finding reversed).

SENSELESSNESS OF THE KILLING: E.g., State v. Johnson, 147 Ariz. 395, 397, 401, 710 P.2d 1050, 1052, 1056 (1985) (defendant admitted he had no reason to kill victim, who had put him and a friend up in her home for two weeks, other than that he felt like killing someone; "heinous and depraved" finding reversed); State v. R.L. Smith, supra ("senselessness" found; "heinous and depraved" finding reversed); State v. Richmond, supra (same); State v. Lujan, 124 Ariz. 365, 372, 604 P.2d 629, 636 (1979) (same).

establish "additional aggravation."[32]

As the en banc Court of Appeals found,

[32] State v. Villafuerte, 142 Ariz. 323, 331, 690 P.2d 42, 50 (1984); State v. Summerlin, 138 Ariz. 426, 436, 675 P.2d 686, 696 (1984); State v. Johnson, 147 Ariz. 395, 401, 710 P.2d 1050, 1056 (1985); State v. B. Smith, 146 Ariz. 491, 503, 707 P.2d 285, 301 (1985). Accord, e.g., State v. Fulminante, 778 P.2d 602, 619, 620-21 (1988) (in addition to dictionary definitions and Gretzler factors, the court "has also" relied on other factors, including a number listed here); State v. Correll, 148 Ariz. 468, 481, 715 P.2d 721, 734 (1986) ("In addition to the five factors presented in Gretzler, we have also found that depravity is indicated" by two additional factors discussed here, including the factor that the offense reveals "a total disregard for human life"); State v. Gillies, 142 Ariz. 564, 570, 691 P.2d 655, 661 (1984) ("The trial court found two factors indicative of heinous and depraved: 1) the senselessness of the murder [a Gretzler factor] and 2) the savage manner of death [not a Gretzler factor]. We agree with both these findings ... [and] believe elimination of witnesses, as a motive for murder [not a Gretzler factor], also illustrates heinousness and depravity"); State v. James, 141 Ariz. 141, 147, 685 P.2d 1293, 1299 (1984) (Gretzler factors are "among others" considered); State v. McCall, 139 Ariz. 147, 161, 677 P.2d 920, 934 (1983) ("[s]everal sorts of actions" support a "finding of depraved or heinous"); State v. Gretzler, 135 Ariz. at 51, 659 P.2d at 10 (authorizing consideration of "'additional circumstances of the nature enumerated [that] set the crime apart from the usual or the norm'" (emphasis added; citation omitted)).

without dissent, what counts in Arizona is not the presence of any one of the Gretzler factors, but rather that there be "something" -- apparently anything -- "about the murder that sets it apart from the norm." State v. Zaragoza, 135 Ariz. 63, 69, 659 P.2d 22, 28 (1983). Some things will do as well. For often in Arizona it is under "the totality of the circumstances [that] the finding of depravity ... [is] sustained." State v. Villafuerte, 142 Ariz. 323, 331, 690 P.2d 42, 50 (1984).[33]

[33] The court, for example, has premised "heinous and depraved" findings on "the totality of the circumstances of [the] killings," State v. Ceja, 126 Ariz. 35, 39, 612 P.2d 491, 495 (1980), "the entire nature of the attack," State v. Roscoe, 145 Ariz. 212, 226, 700 P.2d 1312, 1326 (1985), "society's view of the murder as compared to other murders," State v. Ortiz, 131 Ariz. 195, 204, 639 P.2d 1020, 1031 (1982), "the facts of th[e] case [that] set it 'apart from the norm[].'" State v. Gretzler, 135 Ariz. at 53, 659 P.2d at 12, and any other group of "'circumstances'" that the court finds "'so shocking or repugnant that the murder stands

Under Gretzler's open-ended authorization to identify new factors as each new case comes along and to apply the new factors retroactively in that case, cf. Teague v. Lane, 109 S. Ct. 1060, 1069-70, 1072-75 (1989) (plurality opinion), the Arizona Supreme Court has expanded Gretzler's list of five to include, among the other factors surveyed in Appendix B that the defendant: eschewed a "less violent" means of killing (to wit, a pistol) that was "readily available," State v. Wallace, 151 Ariz. at 368, 728 P.2d at 238;[34] lay in wait, id.;[35] showed

---

out,'" State v. Gillies, 135 Ariz. 500, 515, 662 P.2d 1007, 1022 (1983) (citation omitted).

[34]Compare Godfrey v. Georgia, 446 U.S. at 433 n.16 ("it is constitutionally irrelevant that the petitioner used a shotgun instead of a rifle as the murder weapon, resulting in a gruesome spectacle in his mother-in-law's trailer").

[35]But see State v. Arnett, 119 Ariz. 38, 41-42, 579 P.2d 542, 545-46 (1978) (defendant "lay in wait" for victim; "heinous and depraved"

no "compassion or remorse," State v. James, 141 Ariz. 141, 147, 685 P.2d 1293, 1299 (1984);[36] "could have accomplished whatever criminal goals he desired without killing" the victim, State v. Zaragoza, 135 Ariz. at 69, 659 P.2d at 28; eliminated witnesses to an accompanying felony, e.g., State v. Correll, 148 Ariz. 468, 481, 715 P.2d 721, 734 (1986);[37] killed someone who was

---

circumstance not found by trial court).

[36]But see State v. Carriger, 143 Ariz. 142, 162, 692 P.2d 991, 1011 (1984) ("if [defendant] chooses not to ... admit his guilt, that is irrelevant to a sentencing determination").

[37]But see State v. R.D. Smith, 138 Ariz. 79, 84-86, 673 P.2d 17, 22-24 (1983) ("the uncontradicted evidence before the judge, including Smith's own statements, established that the reason for the killing was to prevent [the victim] from pressing charges of kidnapping and rape;" "heinous and depraved" finding reversed); State v. Hensley, 142 Ariz. 598, 602, 604, 691 P.2d 698, 693, 695 (1984) (defendant shot and killed three persons present at robbery of a bar for the avowed purpose of "leaving no witnesses;" "heinous and depraved" finding reversed).

old, young, female, his mother, or had displayed "generosity and concern" for the defendant;[38] acted "totally without regard for human life" or "for the fundamental principles upon which our society is based," State v. Wallace, 160 Ariz. 424, 428, 773 P.2d 983, 987 (1989);

---

[38] State v. Zaragoza, 135 Ariz. 63, 69-70, 659 P.2d 22, 28-29 (1983) (elderly victim); State v. Roscoe, 145 Ariz. 212, 226, 700 P.2d 1312, 1326 (1984) (young victim); State v. Summerlin, 138 Ariz. 426, 436, 675 P.2d 686, 696 (1983) (female victim, neither young nor old; "heinous" finding affirmed because case otherwise resembled Zaragoza, supra and Roscoe, supra); State v. Moorman, 154 Ariz. 578, 587, 744 P.2d 679, 688 (1987) ("matricide" per se "above the norm of first-degree murder"); State v. Fisher, 141 Ariz. 227, 252, 686 P.2d 750, 775 (1984) (victim showed defendant compassion). But see State v. Schad, 129 Ariz. 557, 573-74, 633 P.2d 366, 382-83 (1981) (victim 74 years old; "heinous and depraved" not found by trial court); State v. Girdler, 138 Ariz. 482, 484, 675 P.2d 1301, 1303, (1983) (defendant burned young child to death; "heinous and depraved" not found); State v. Johnson, 147 Ariz. 395, 397, 401, 710 P.2d 1050, 1052, 1056 (1985) (defendant, admittedly for no reason other than that he felt like killing someone, shot and killed a childhood friend who had been providing him with a place to stay for weeks; "heinous and depraved" finding reversed).

State v. Martinez-Villareal, 145 Ariz. 441, 451, 702 P.2d 670, 680 (1985); and "violated the special parental relationship," State v. Fulminante, 778 P.2d 602, 621 (Ariz. 1989); and the Arizona Supreme Court also has affirmed "heinous and depraved" findings because the killing was "cold-blooded," State v. R.L. Smith, 141 Ariz. 510, 512, 687 P.2d 1265, 1267 (1984);[39] "savage," State v. Gillies, 142 Ariz. 564, 570, 691 P.2d 655, 661 (1984); "ghastly," State v. Knapp, 114 Ariz. at

---

[39] But see State v. B. Smith, 146 Ariz. 491, 504, 707 P.2d 289, 302 (1985) ("That defendant's actions may have been cold and deliberate demonstrates not heinousness or depravity but ... intent;" "heinous and depraved" finding reversed); State v. Madsen, 125 Ariz. 246, 247-48, 252, 609 P.2d 1046, 1047-48, 1052 (1980) (murder of wife with gun she had just helped him site, thinking they were engaging in target practice, followed by defendant's statement "there, that's done" and his collection of insurance money was "cold-blooded;" "heinous and depraved" finding reversed).

543, 562 P.2d at 716;[40] and "repugnant to a civilized society," State v. Beaty, 158 Ariz. 232, 243, 762 P.2d 519, 530 (1988) (citation omitted). See Adamson v. Ricketts, 865 F.2d at 1034-35 (citing numerous exemplary cases) (the "possibilities appear endless").[41] In short, although the Arizona Supreme Court has said that numerous factors "can support this aggravating circumstance, ... the court has refused to hold that any one of those factors must be present for a murder to satisfy [the] ... circumstance.

---

[40] But see State v. Richmond, 136 Ariz. 312, 323, 666 P.2d 57, 68 (1983) (Cameron, J., concurring, in opinion joined by majority of court) ("It is true that [the murder] ... was ghastly;" "heinous and depraved" finding reversed).

[41] Accord Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases, 64 N.C.L. Rev. 941, 981 (1986) (comprehensive review of Arizona's "heinous ... or depraved" cases, concluding that, "[w]henever anything about a murder has proved offensive to the [Arizona] court . . . it has approved [the] especially heinous [factor]").

The underlying position of the ... court appears to be that it can simply review the circumstances of the murder and divine whether the murder was 'especially heinous ....'" Cartwright v. Maynard, 822 F.2d at 1491 (emphasis added) (quoted in part in Maynard v. Cartwright, 108 S. Ct. at 1857).

The result of "such an open-ended construction," Gregg v. Georgia, 428 U.S. at 201, is not hard to predict: "within the plethora of factors the Arizona courts may consider there has been much contradiction and inconsistency in the application of the (F)(6) circumstance ... plainly demonstrat[ing] that the ... circumstance has been applied in an arbitrary and capricious manner in violation of the most basic principles of death penalty jurisprudence." Adamson v. Ricketts, 865 F.2d at 1037-38 (surveying

50 Arizona cases). See, e.g., decisions cited supra notes 31, 35-40 and accompanying text. As the Court of Appeals concluded in this case, based on its own comparison of Arizona cases, "Arizona's existing standard ... for murder committed in an 'especially heinous ... or depraved manner,'" has "los[t] its ability to distinguish in a principled manner between those it condemns to death and those it does not." 832 F.2d at 486. See id. at 484-85. Compare Cartwright v. Maynard, 822 F.2d at 1490.

The Court of Appeals' comprehensive analysis of the Arizona cases more than amply documents that Arizona's construction of the "heinous ... depraved" circumstance has replicated the "major systemic defects identified in Furman." Pulley v. Harris, 465 U.S. at

54. In word as well as result, that construction provides "no meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. at 313 (White, J., concurring).

Because this Court has "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, [are] enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty," Maynard v. Cartwright, 108 S. Ct. at 1859, no further analysis is necessary to invalidate Mr. Jeffers' death sentence.

B. The Arizona Courts' Application of the "Heinous ... or Depraved" Aggravating Circumstance in Mr. Jeffers' Case Runs Afoul of the Eighth Amendment Rule of Godfrey

Even if the Arizona courts had maintained a constitutional construction of the "especially heinous ... or depraved" aggravating circumstance, they applied no such construction in Mr. Jeffers' case. Accordingly, his death sentence violates the constitutional rule of Godfrey v. Georgia. "[I]n light of the facts and circumstances of the murder[] that [the defendant] was convicted of committing," the state courts cannot "be said to have applied in this case a constitutional construction" of the "especially heinous ... or depraved" circumstance. Godfrey v. Georgia, 446 U.S. at 432.

The facts of Mr. Jeffers' case, like those of Godfrey, fall within no such

construction supplied by state law. As found by the state courts, those facts do show that Mr. Jeffers formed an unlawful intention, borne of years of domestic strife, voluntary substance abuse, and the victim's having informed the authorities about his illegal activities, to kill Penelope Cheney, compare Godfrey v. Georgia, 446 U.S. at 424 & n.3; and that he premeditated and carried out that intention in the full flowering of his anger, not only deliberately (though painlessly) killing Ms. Cheney, but also cursing her and hitting her "with his hands about the face four or five times" after she died. J.A. 13-14. See J.A. 18-19. Much as Mr. Godfrey told the police moments after killing his wife and mother-in-law with shotgun blasts to the head (in between which he "took out time not only to strike his daughter on the

head [with the barrel of his gun], but also to reload his single-shot shotgun"), Mr. Jeffers "committed a hideous crime" that he had thought "about ... for [some time]." Godfrey v. Georgia, 446 U.S. at 425-26; id. at 449 (White, J., dissenting). Like Mr. Godfrey, Mr. Jeffers was found guilty of "the unjustified, intentional taking of human life." Maynard v. Cartwright, 108 S. Ct. at 1859. But these facts do not "differentiate this case in an objective, evenhanded, and substantively rational way from the many ... murder cases in which the death penalty may not be imposed," Zant v. Stephens, 462 U.S. at 879.

At the time of both of Mr. Jeffers' sentencing proceedings, in the spring of 1978 and the summer of 1980, the only Arizona Supreme Court guides to the

meaning of the "especially heinous ... or depraved" circumstance were the dictionary definitions that State v. Knapp had quoted from Webster's Third New International Dictionary: "'heinous'" means "'hatefully or shockingly evil: grossly bad'" and "'depraved'" means "'marked by debasement, corruption, perversion or deterioration.'" 114 Ariz. at 543, 562 P.2d at 716. As in Godfrey, the sentencer here was instructed exclusively "in the words of the statute" and in a series of "excessively vague" and "highly subjective" synonyms. Maynard v. Cartwright, 108 S. Ct. at 1858; California v. Ramos, 463 U.S. 992, 1000 n.12 (1983); Zant v. Stephens, 462 U.S. at 878 (all discussing Godfrey). The State's submission to the trial court was -- as it has remained in every court including

this one -- simply that the "totality of the circumstances" controlled;[42] and it was those circumstances, in their totality, that the trial court gave as the only explanation of its finding that "the defendant committed the offense of first degree murder in an especially heinous, cruel and depraved manner." J.A. 13-14 (quoted supra pp. 6-7). See J.A. 60-61. Precisely as in Godfrey and

[42]Without iterating a standard, the State's presentencing submissions merely referred the sentencer to a number of circumstances of the case, such as Mr. Jeffers' initiation of the fatal acts, his injection of more heroin than "necessary to kill the victim," his "cussing" and "swearing at the body" and "verbalizations of hate" towards the victim, his "needless and senseless" actions, the victim's "resistless" condition, the "brutality exhibited in disposal and interment," Mr. Jeffers' "macabre and heinous propensities," his failure to confess, his "shockingly evil conduct," and the "evidence of a cruel and depraved mental state." July 10, 1980 T. 189; State's June 5, 1980 Resentencing Memorandum, at 2-3. See also State's Dec. 16, 1980 Answering Brief on Appeal (Resentencing Only), at 20-21 (arguing that "'totality of circumstances'" controls). See also Petitioner's Brief in this Court, at 15-17.

Maynard, therefore, there was "nothing in th[e] few words" of the statute or in "the events recited by" the trial court to constrain "the unfettered discretion of the [sentencer] and to satisfy the commands of the Eighth Amendment." Godfrey v. Georgia, 446 U.S. at 428; Maynard v. Cartwright, 108 S. Ct. at 1859.[43]

Nor was the "standardless and unchanneled imposition of [a] death sentence[] in the uncontrolled discretion of a basically uninstructed" sentencer

[43]The Arizona Supreme Court itself documented the sentencer's overbroad approach to aggravating circumstances, concluding that the trial court (1) improperly "stretch[ed] the statute to extreme length" in finding the "grave risk of death to another person" circumstance; (2) erred in finding "cruelty" although it was "not proven" because "the victim experienced no pain or mental suffering;" and (3) relied "largely" on "acts which occurred after the victim's death" and which the high court refused to endorse as proper bases for an "especially heinous" finding. J.A. 57-62.

"cured by the affirmance of th[at] sentence[] by the state Supreme Court." Godfrey v. Georgia, 446 U.S. at 429. For the Arizona Supreme Court did in microcosm in Mr. Jeffers' case what the en banc Court of Appeals in Adamson concluded has been done in macrocosm in construing and applying the "especially heinous ... or depraved" circumstance in all other post-Gretzler cases. Reviewing the totality of the circumstances in such light as was shed by the "dictionary definitions of the [statutory] words used" (J.A. 60) and asking only "that the murder be ... especially depraved" (J.A. 63) (emphasis in original), the Court affirmed the (F)(6) finding in Mr. Jeffers' case upon concluding that it could identify factors in the case that somehow "distinguished the murder[] from the 'usual or the norm' of first degree

murders." J.A. 62. See J.A. 64.

Although the Arizona Supreme Court recited a number of factors (see J.A. at 60-61), it focused on two -- the same two factors noted above by means of which the jury, sentencer, and supreme court rightfully concluded that the murder of Ms. Cheney was unjustified, premeditated, and first degree: After the victim apparently had died, Mr. Jeffers swore at her and hit her on the head with his hands four or five times, reciting the names of his associates who were arrested after Ms. Cheney spoke to the police. J.A. 61, 63. See also Jeffers v. Ricketts, 627 F. Supp. at 1342. The court dressed up those facts in the language of two of the Gretzler factors -- "relish" because Mr. Jeffers swore at the victim and verbalized his motive for killing her, and "gratuitous violence"

because of the four or five slaps. But motivation, premeditation, and deliberation is all that these factors reveal. No more than Godfrey's multiple shotgun blasts, the blow Godfrey delivered to his daughter's head with his gun, and Godfrey's statements about contemplating the killing for years and being prepared to "do it again," can Mr. Jeffers' actions "be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of [first-degree] murder," so as to provide a "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, 446 U.S. at 433.

The aptness of Godfrey's "no principled way" conclusion as a description of what transpired in Mr. Jeffers' case is

illustrated in two ways, as the court below concluded. First, the equation in Mr. Jeffers' case of the "relish" and "gratuitous violence" factors with a defendant's verbal and physical expressions of the motivations precipitating his homicidal deliberation and action departed from any "core" meaning the two factors once may have had. Second, that equation also departs from the analysis and results in numerous first-degree murder cases in which no "heinous ... or depraved" finding was made or, if made, was reversed notwithstanding far more "relish" and post-mortem violence than Mr. Jeffers exhibited.

If any "core" principle can be discerned as giving shape to Gretzler's concept of "relish," it is a requirement of actions or verbalizations, distinct

from those constituting or revealing the actus and mens rea during the commission of the homicide itself, that manifest an after-the-fact expression of the defendant's enjoyment of killing for its own sake. State v. Gretzler, 135 Ariz. at 52, 659 P.2d at 11 (quoting State v. Clark, 126 Ariz. 428, 437, 616 P.2d 888, 897 (1980)) ("we found a depraved state of mind where defendant murdered four people and then 'kept a spent bullet as a grisly souvenir of his crime'").[44] In contrast to every other case in which

---

[44] See also State v. Rossi, 146 Ariz. 359, 365, 706 P.2d 371, 377 (1985) (defendant kept "souvenir" of crime); State v. Gerlaugh, 144 Ariz. 449, 454, 698 P.2d 694, 699 (1985) (defendant later likened the killing to "shoot[ing] game"); State v. Gillies, 142 Ariz. 564, 571, 691 P.2d 655, 661-62 (1984) (defendant later joked about the killing); State v. Lambright, 138 Ariz. 63, 67, 75, 673 P.2d 1, 5, 13 (1983) (defendant later "engaged in a macabre celebration of the killing" and kept a "memento" from it); State v. Vickers, 129 Ariz. 506, 509, 633 P.2d 315, 318 (1981) (defendant told reporter he enjoys killing).

the Arizona Supreme Court has found "relish," however, Mr. Jeffers' case exhibits no such expressions either after the homicidal acts or in reference to killing anyone besides Ms. Cheney. The "relish" concept cannot be expanded to reach Mr. Jeffers' contemporaneous expressions of the motivation that led him to commit the homicide itself without losing all capacity to differentiate his case, in which "heinousness" was found and the death penalty imposed, from the many Arizona cases in which that did not occur notwithstanding contemporaneous and even after-the-fact expressions of premeditation, motivation, and even homicidal pleasure in general going far beyond anything of which Mr. Jeffers can

be accused.[45]

---

[45] Compare, e.g., State v. Carr, 154 Ariz. 468, 469, 743 P.2d 1386, 1387 (1987) (defendant slashed victim's neck and repeatedly stabbed victim, saying as he did so, "'that will teach you;'" trial court found that offense was not "heinous and depraved;" sentencing order lodged with Court); State v. Kinkade, 147 Ariz. 250, 252, 709 P.2d 884, 886 (1985) (defendant lured victim who owed defendant money on a gambling debt to the desert where he shot the victim three times in the back of the head, pulled the dead victim out of the car, and shot the victim a fourth time, saying, "'So, you like to gamble, huh, fucker?;'" trial court found that offense was not "heinous and depraved;" sentencing order lodged with Court); State v. Vaughn, 147 Ariz. 28, 28-29, 708 P.2d 453, 453-54 (1985) (defendant bragged to accomplice driving getaway car as they left the scene that he forced the gas station attendant into the rest room, made him kneel, ordered him to beg for his life, then shot him execution-style; trial court found that offense was not "heinous or depraved;" sentencing order lodged with Court); State v. Madsen, 125 Ariz. 346, 347-48, 353, 609 P.2d 1046, 1048, 1053 (1980) (after defendant lured his estranged wife to desert on target-shooting pretext, he shot her, commenting, "there, that's done;" later defendant told a friend, "It's easy to get money, you just blow someone away and collect the insurance;" "heinous and depraved" finding reversed); State v. Brookover, 124 Ariz. at 39, 601 P.2d at 1323-24 (1979) (defendant shot drug dealer in other dealers' presence to convince latter he was a "heavyweight;" after firing first shot, following which the prone victim pleaded for his life, defendant said, "'don't worry, buddy, it'll be over soon'" and shot him a second

A like conclusion pertains to the "gratuitous violence" factor. If Gretzler can be said to have given that phrase any content at all, it was by referring to a "'barrage of violence'" against the victim made up of numerous shots or blows, "each of which," as the court elsewhere has required, "would have

---

time; "heinous and depraved" finding reversed). See also State v. Graham, 135 Ariz. 209, 212, 660 P.2d 460, 463 (1983) (to "impress" his friends, the smiling defendant described the victim's reaction to being shot as "'squeal[ing] like a rabbit;'" "heinous and depraved" finding reversed); State v. Rockwell, 161 Ariz. 5, 8 & n.2, 9-10, 775 P.2d 1069, 1072 & n.2, 1073-79 (1989) (defendant "boasted" and "bragged" to friends and relatives about "execution-style" robbery-killing to "project[] a macho image;" "heinous and depraved" not found by trial court); State v. R.L. Smith, 141 Ariz. 510, 511-12, 687 P.2d 1265, 1266-67 (1984) (defendant "laughed and joked about the murder" afterward; "heinous and depraved" reversed); State v. Lamb, 142 Ariz. 463, 467, 690 P.2d 764, 768 (1984) (defendant bragged to friend after bludgeoning two robbery-murder victims to death with a two-by-four, that "you can get away with murder in Phoenix;" no "heinous and depraved" finding reported). See generally decisions reviewed in Adamson v. Ricketts, 865 F.2d at 1037-38; Jeffers v. Ricketts, 832 F.2d at 484-85.

been fatal in itself."[46] Yet the facts found in this case, unlike those found in every other case in which the Arizona Supreme Court has relied upon the factor, reflect nothing like a "barrage" of potentially homicidal post-mortem violence. Nor can the "gratuitous violence" factor be enlarged, as it was in Mr. Jeffers' case, to any increment of violence beyond that medically sufficient to kill, without destroying the concept's capacity to distinguish "heinous" and

---

[46] State v. Gretzler, 135 Ariz. at 52, 659 P.2d at 11 (quoting State v. Ceja, 126 Ariz. 35, 612 P.2d 491, 493-96 (1980) and State v. Ceja, 115 Ariz. 413, 414, 565 P.2d 1274, 1277-78 (1977) (multiple potentially fatal shots to multiple victims)); State v. Fisher, 141 Ariz. 227, 252, 686 P.2d 750, 775 (1984) (emphasis added). See, e.g., State v. LaGrand, 153 Ariz. 21, 36, 734 P.2d 563, 578 (1987) (multiple stab wounds, "five [of which] would have immediately killed" the victim); State v. Gerlaugh, 144 Ariz. 449, 454, 698 P.2d 694, 699 (1985) (multiple attacks "caused several injuries, any of which would have been fatal"); State v. McCall, 139 Ariz. 147, 162, 677 P.2d 920, 935 (1983) (multiple attacks, each "potentially fatal").

"non-heinous," death and life, cases in Arizona on the basis of a recognizable principle.[47]

---

[47] Compare, e.g., State v. Carr, 154, Ariz. 468, 469, 743 P.2d 1386, 1387 (1987) (defendant killed victim with stab wound to neck, then stabbed victim repeatedly in the back, including one 15" wound; trial court found that offense was not "heinous and depraved;" sentencing order lodged with Court); State v. Kinkade, 147 Ariz. 250, 252, 709 P.2d 884, 886 (1985) (defendant shot victim in back of head at point-blank range three times, then pulled dead victim out of the car and shot him again; trial court found that offense was not "heinous and depraved;" sentencing order lodged with Court); State v. R.D. Smith, 138 Ariz. 79, 85-86, 673 P.2d 17, 22-24 (1983) (defendant strangled rape victim, held her while codefendant stabbed her, then crushed victim with rocks; "heinous and depraved" finding reversed); State v. Richmond, 136 Ariz. 312, 315, 319, 666 P.2d 57, 60, 64 (Ariz. 1983) (defendant beat robbery victim unconscious with fists, dropped "large rocks" on him, drove car over "helpless[]" victim's head, crushing the skull, then drove the car over the victim's body, crushing it; "heinous and depraved" finding reversed by majority of concurring justices); State v. Blazak, 131 Ariz. 598, 602, 643 P.2d 694, 700 (1983) (defendant shot bartender four times at close range during robbery then shot two nearby patrons, killing one; "heinous and depraved" finding reversed); State v. Watson, 120 Ariz. 441, 448, 586 P.2d 1253, 1260 (1978) (defendant shot victim four times, the last time after victim was lying face down on floor; "heinous and depraved" finding reversed); State v. Arnett, 119 Ariz. 38, 41-42,

On this record, one of three conclusions must be reached: Either the terms "relish" and "gratuitous violence" have no "core" meaning at all beyond the premeditation and unjustifiability that characterize all first degree murders; or the Arizona Supreme Court departed in Mr. Jeffers' case from whatever "'objective'" and "'rationally reviewable'" meaning one might possibly ascribe to those terms; or that the court considers those characteristics merely relevant, but not decisive for a "heinous and depraved" finding, and that it is the totality of circumstances that, subjectively,

---

48, 579 P.2d 542, 545-46, 552 (1978) (defendant lay in wait for robbery victim then shot him five times with an M-1 carbine, "any one of which [shots] could have been fatal in itself;" "heinous and depraved" not found). See generally decisions surveyed in Adamson v. Ricketts, 865 F.2d at 1037-38; Jeffers v. Ricketts, 832 F.2d at 484-85.

controls. Through whichever cause, the terms "relish" and "gratuitous violence," at least as applied in this case, lost the "ability to distinguish in a principled manner between those [whom Arizona] condemns to death and those it does not," Jeffers v. Ricketts, 832 F.2d at 486.

III. ARIZONA'S EFFORTS TO AVOID THE CLEAR DICTATES OF MAYNARD AND GODFREY BY CREATING A SPURIOUS "STANDARD OF REVIEW" ISSUE ARE UNAVAILING

The State seeks to portray this case as one that resolves into three questions: (1) Is there a state-law "rule" according to which the "especially heinous ... or depraved" circumstance is applied? (2) If so, is that "rule" constitutionally valid? (3) If so, is the instant case within that "rule?" Petitioner's Brief, at 10-12. See also Brief Amicus Curiae

of the Criminal Justice Legal Foundation, at 4-8. The State contends that question number (2) is not open to Mr. Jeffers in this Court and that question number (3) can be governed by no stricter "standard of review" than a "rational factfinder" test.

This framing of the issues is manifestly driven by the necessary concession that the State's second question -- the so-called Maynard-Adamson question -- is a pure question of federal law, which the federal courts on certiorari or habeas corpus are obliged to review de novo. Petitioner's Brief, at 7, 10-11. See also Brief Amicus Curiae of the Criminal Justice Legal Foundation, at 9-10. The State's "standard of review" argument, advanced as the sole basis for reversal of the Ninth Circuit's judgment, does not even

purport to take issue with that judgment insofar as the judgment was rendered or is sustainable under a Maynard-Adamson analysis. The unavoidability of the State's conceding this point explains its unsuccessful contortions in an effort first, to excise the Maynard-Adamson analysis from the panel opinion below, then to obscure the panel's and the en banc Court of Appeals' denial of rehearing in the light of Adamson, and finally to divert this Court from its longstanding rule permitting the prevailing party below to "defend a judgment on any ground which the law and record permit that would not expand the relief granted." United States v. New York Telephone Co., 434 U.S. 159, 166 n.8 (1977). Given the role that the Maynard-Adamson analysis actually played in both the original and rehearing proceedings in

Mr. Jeffers' case and the clear availability of that analysis for defending the Ninth Circuit's judgment in this Court irrespective of the exact ground of decision below, the State's inescapable concession with regard to its so-called second question provides sufficient basis for dismissal of certiorari or affirmance of the Ninth Circuit without more. See supra note 14.

In any event, Arizona only succeeds in stating its third question as one on which deference is due to the state courts by a verbal sleight of hand, namely, by using the singular "rule" to refer to what in fact is two rules, one arising under state law and the other under federal law. In Arizona, as we have shown in Part I supra, the same verbal formulation -- that is, the same

statutory aggravating circumstance -- serves both the state-law function of justifying a death sentence, and the "constitutionally necessary" federal function of "'genuinely narrow[ing] the class of persons eligible for the death penalty and ... reasonably justify[ing] the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" Lowenfield v. Phelps, 108 S. Ct. at 554 (quoting Zant v. Stephens, 462 U.S. at 876-77)). Once these two functions are separated, the distinctness of the standard of federal review appropriate to each becomes clear, as does the pernicious and unprecedented nature of the State's attempt to conflate the two standards. For, while it is true that a state court's "especially heinous ... or depraved" finding, insofar as it is a matter of state law, is reviewable

by the federal courts only under the "rational factfinder" rule of Jackson v. Virginia, 443 U.S. 307, 313, 324 (1979),[48] a different standard of review

[48] Jackson provides the appropriate standard of review when -- as in the cases the State cites as supposedly in conflict with the decision below -- the sole issue is whether the State has adduced sufficient evidence to convince a rational factfinder beyond a reasonable doubt of the defendant's eligibility for death under an aggravating circumstance or other statutory provision that either has "no part to play in the constitutionally required narrowing process" (Lowenfield v. Phelps, 108 S. Ct. at 555; e.g., Barclay v. Florida, 463 U.S. at 967-69 & n.16 (Stevens, J., concurring)) or has been authoritatively narrowed so as routinely to serve its federal role (e.g., Barclay v. Florida, 463 U.S. at 947-48 & nn.4, 5 (plurality opinion)). See Magwood v. Smith, 791 F.2d 1438, 1441, 1447-50 (11th Cir. 1986), cert. denied, 110 S. Ct. 291 (1989) ("clear error" test applied in reviewing state trial court's rejection of two mitigating factors, neither of them subject to constitutional challenge); Ford v. Strickland, 696 F.2d 804, 819 (11th Cir.) (en banc), cert. denied, 464 U.S. 865 (1983) (limited federal review when petitioner "contends that under Florida case law, the court should have set aside two aggravating circumstances" specified in a "properly drawn statute with appropriate standards to guide discretion" (emphasis added)). See also Godfrey v. Georgia, 446 U.S. at 451, 454-56 (White, J., dissenting) (only upon concluding that the aggravating circumstance was not "assailable on

is applicable when the "especially heinous ... or depraved" formulation is used by the State to satisfy the distinct "fundamental constitutional requirement" (Maynard v. Cartwright, 108 S. Ct. at 1858) of providing "an objective,

constitutional grounds" or "aberration[ally]" applied does opinion review the finding of that circumstance under a "rational factfinder" standard). The "rational factfinder" analysis governs most aggravating circumstance determinations, for most aggravating circumstances on their face clearly and concretely perform the constitutionally required limiting and channeling function. See Godfrey v. Georgia, 446 U.S. at 423 n.2 (distinguishing "especially heinous" cognate at issue there from all other aggravating circumstances in the Georgia statute which "are considerably more specific or objectively measurable"). Review of the sort discussed in Part II supra, accordingly is reserved for the few statutory "narrowing" devices such as Arizona's "especially heinous ... or depraved" clause that on their face are "so broad that [they] may ... vitiate[] the role of the aggravating circumstance in guiding the sentencing discretion," McCleskey v. Kemp, 481 U.S. 279, 305 (1987), and "so vague that they would fail adequately to channel ... sentencing patterns ... with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur," Gregg v. Georgia, 428 U.S. at 195 n.46 (opinion of Stewart, Powell and Stevens, JJ.).

evenhanded, and substantively rational way" of distinguishing Mr. Jeffers' case from the many first degree murder cases in Arizona in which death sentences have not been imposed. Zant v. Stephens, 462 U.S. at 879. Because the latter requirement is a federal constitutional requirement, the question of the State's compliance with it -- the Godfrey question -- is subject to the same independent federal constitutional review as the Maynard-Adamson question with regard to which the State concedes the point.

Not only in Godfrey and Maynard but in numerous analogous cases, this Court has confronted "rules" that serve dual state and federal functions and has carefully avoided letting its deference to a state court's conclusion with regard to the rule's service of a state-law function

interfere with the Court's own independent review of the rule's capacity under the facts and circumstances of the case to serve its federal constitutional function. For example, a state court's ruling that a custodial confession is "voluntary," in keeping with the various evidentiary functions that the state's voluntariness rule serves, has never led this Court to defer to that ruling in determining whether the manner in which the confession was obtained serves the functions of the similarly christened, but not always similarly conceived, voluntariness rule under the Fifth and Fourteenth Amendments. For, as the Court frequently has remarked in that context, "we cannot avoid our responsibilities by permitting ourselves to be 'completely bound by state court determination of any issue essential to decision of a claim of

federal right, else federal law could be frustrated ....'" Haynes v. Washington, 373 U.S. 503, 515-16 (1963) (quoting Stein v. New York, 346 U.S. 156, 181 (1953)). "Without exception," therefore, the Court's confession cases hold that the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination. ... As early as 1978, the Court reaffirmed that it was 'not bound by' a state-court voluntariness finding and reiterated its historic 'duty to make an independent evaluation of the [issue].'" Miller v. Fenton, 474 U.S. 104, 110 (1985) (quoting Mincey v. Arizona, 437 U.S. 385, 398 (1978)).[49]

---

[49] See also Jackson v. Denno, 378 U.S. 368, 386-87 & n.13 (1964) (States are free to use juries to determine voluntariness in service of the state-law functions of the voluntariness rule, but are required initially to use judges to determine voluntariness in order to serve the rule's

Examples of this principle abound. Manifestly, what for state-law purposes may sufficiently constitute "probable

---

federal constitutional functions); Rogers v. Richmond, 365 U.S. 534, 547 (1961) (Court will not defer to historical facts found in the process of a state voluntariness determination if the function of the state-law rule differs substantially from the functions of the federal voluntariness requirement, because "[h]istorical facts 'found' in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct conclusion if and merely because a correct standard is later applied to them"). In this case, unlike in Rogers v. Richmond, supra, no questions of historical fact arise. Rather, the concepts that the issue presented here call upon the Court to apply -- whether "the narrowing function required for a regime of capital punishment" has been served, and whether the "heinousness" aggravating circumstance provides "'clear and objective standards,'" "'specific and detailed guidance,'" a "'rationally reviewable ... [capital sentencing] process,'" and "'a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not,'" Lowenfield v. Phelps, 108 S. Ct. at 555; Godfrey v. Georgia, 446 U.S. at 427-28 (citations omitted) -- all are manifestly legal standards that "can be given meaning" by this Court "only through its application [of those standards] to the particular circumstances of a case," hence as to which the Court's review must be plenary. Miller v. Fenton, 474 U.S. at 114.

cause" to search, seize, or arrest, "competency to stand trial," "effective legal representation," "intent to kill" sufficient to warrant imposition of the death penalty, "full and adequate" consideration of mitigating circumstances in capital sentencing, or a "comprehensible instruction" to juries on any number of guilt-innocence and sentencing-phase issues does not necessarily satisfy the purposes served by the Fourth, Eighth, and Fourteenth Amendment rules that go by the same names. Accordingly, in all those fields, and in many more besides, the Court routinely applies its own independent judgment to the question whether the facts of a case bring it within those federal constitutional "rules," notwithstanding that the cases nearly always reach the Court on a record

containing a state-court determination that the facts bring the case within a similarly denominated state-law "rule."[50]

---

[50] E.g., Penry v. Lynaugh, 109 S. Ct. 2934, 2950 (1989) (although Texas concluded that its sentencing-phase question concerning the defendant's "future dangerousness" adequately served the function of bringing mitigating factors before the sentencer for state-law purposes, this Court, on independent review, concluded that the procedure fell afoul of the Eighth Amendment function the submission and unfettered consideration of mitigating factors is required to play in capital sentencing); Mills v. Maryland, 108 S. Ct. 1860, 1867, 1870 (1988) (review of jury instruction on mitigation that state's high court had deemed sufficient to inform individual jurors that they were required to consider whatever mitigation each of them found in the case as required by state law; "[w]hile conceding that the [Maryland] Court of Appeal's construction of the jury instruction ... is plausible," hence that under a "rational basis" test affirmance would be required, Court went on to conduct independent review under the Eighth Amendment and to reverse); Tison v. Arizona, 481 U.S. 137, 155-56 n.11 (1987) ("The fact that the Arizona Supreme Court purported to find 'intent to kill' before affirming [the] death sentences" involved in the case did not bind the Supreme Court to conclude that the federal "intent to kill" threshold for capitally punishing the petitioners had been crossed; upon independent review, the Court concluded that Arizona's "intent" rule does not serve the function that federal law requires of its similarly worded minimum-culpability rule and

remanded for further proceedings under the federal rule); Cabana v. Bullock, 474 U.S. 376, 385 n.3, 387, 390 (1986) (similarly independent review of alternative federal-law threshold for capital sentencing that the defendant "actually killed," notwithstanding state-law determination under Mississippi's accessorial liability rules that the defendant "by legal definition [had] actually killed;'" for "there is a class of persons whom the State may define as having committed capital murder but whom [the Eighth Amendment provides] the State may not permissibly execute" (emphasis in original; citation omitted); Francis v. Franklin, 471 U.S. 307, 315-16 (1985) (in reviewing jury instruction that state courts had deemed sufficient to inform the jurors in regard to the prosecution's burden of proof, Court held that "[t]he question ... is not what the State Supreme Court declares the meaning of the charge to be, but rather what [the Court itself concludes that] a reasonable juror could have understood the charge as meaning"); Cuyler v. Sullivan, 446 U.S. 335, 341-43 (1980) (review of whether facts of case reflected "effectiveness of counsel" was independent notwithstanding state courts' satisfaction on the issue); Drope v. Missouri, 420 U.S. 162, 175 (1975) (quoting Norris v. Alabama, 326 U.S. 271, 276 (1945)) (notwithstanding state court determination that defendant was competent to stand trial, Court concluded that "it is 'incumbent upon'" it to review the defendant's competency independently "'in order that the appropriate enforcement of the federal right may be assured'"); Aguilar v. Texas, 378 U.S. 108, 111 (1964) (independent review of state judicial determination of "probable cause").

A similar independent analysis rightly applies to the Godfrey issue presented in the instant case. For notwithstanding the state courts' satisfaction that the "especially heinous ... or depraved" circumstance served its appointed state-law function of setting Mr. Jeffers' case apart from some unstated "norm" of first-degree murders in Arizona, that circumstance, thus interpreted and applied, is "so vague" and "so broad" that it "vitiate[s] the [federal constitutional] role of the aggravating circumstance in guiding ... sentencing discretion," with "the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman [has] occur[red]." McCleskey v. Kemp, 481 U.S. 279, 305 (1987); Gregg v. Georgia, 428 U.S. at 195 n.45.

As the Eleventh Circuit recognized soon after Godfrey, unraveling precisely the same state and federal functions that Arizona attempts to obscure by tying in knots here:

> The question is not whether we agree with the sentencing court that appellant [under state law] should receive the death penalty. See note 51 supra [discussing the application of Jackson v. Virginia to that question]. ... Rather, the issue we must decide is whether the construction of the ["especially heinous"] factor evinced by the [state] court[s'] application of it to the facts of this case comports with the eighth amendment requirement that death sentences be based on clear, detailed, and rationally reviewable standards. See Godfrey v. Georgia, 446 U.S. at 427-33.

Proffitt v. Wainwright, 685 F.2d at 1263.

The latter issue, without doubt, is a federal legal issue requiring independent federal judicial consideration. It is the issue that the majority posed and resolved below, correctly under Godfrey. Like the

dissent below, the State can avoid that issue only by disregarding the square holdings of both Godfrey and Maynard and arguing that the words "especially heinous ... or depraved," standing alone, are constitutionally sufficient. Respect for precedent and reality alike compel rejection of that argument.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted

James S. Liebman*
(Appointed by the Court)
435 W. 116th St.
Box B-16
New York, New York 10027
212-854-3423

Susan A. Kettlewell
Pima County Public Defender
Donald S. Klein
Frank P. Leto
Assistant Public Defenders
32 North Stone
Fourth Floor
Tucson, Arizona 85701
602-740-5300

*Counsel of Record

(7)

Supreme Court, U.S.
FILED
DEC 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SAMUEL A. LEWIS,
Director, Arizona Department of Corrections, and
DONALD WAWRZASZEK,
Superintendent, Arizona State Prison,
Petitioners,

v.

JIMMIE WAYNE JEFFERS,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

APPENDIX TO RESPONDENTS BRIEF

JAMES S. LIEBMAN*
(Appointed by the Court)
435 W. 116th St.
Box B-16
New York, New York 10027
212-854-3423

SUSAN A. KETTLEWELL
Pima County Public Defender
DONALD S. KLEIN
FRANK P. LETO
Assistant Public Defenders
32 North Stone
Fourth Floor
Tucson, Arizona 85701
602-740-5300
Attorneys for Respondent
**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

28 pp
folded

APPENDIX A: Arizona Revised Statute § 13-703 ..... A-1

APPENDIX B: Arizona Trial and Supreme Court Treatment of the (F)(6) Aggravating Circumstance, 1974-89 ..... B-1

APPENDIX A

Arizona Revised Statutes

§ 13-703. Sentence of death or life imprisonment without possibility of release until the defendant has served a prescribed period of time; aggravating and mitigating circumstances

A. A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life, without possibility of release on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age, as determined and in accordance with the procedures provided in subsections B through G of this section.

B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in § 13-1105, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge in the event of the death, resignation, incapacity or disqualification of the judge who presided at the trial or before whom the guilty plea was entered, shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the

court alone.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is

on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section.

E. In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis until the defendant has served twenty-five calendar years if the victim was fifteen or more years of age or thirty-five calendar years if the victim was under fifteen years of age, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United

States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while in the custody of the state department of corrections, a law enforcement agency or county or city jail.

8. The defendant has been convicted of one or more other homicides, as defined in § 13-1101, which were committed during the commission of the offense.

9. The defendant was an adult at the time the offense was committed or was tried as an adult and the victim was under fifteen years of age.

10. The murdered individual was an on duty peace officer who was killed in the course of performing his official duties

and the defendant knew, or should have known, that the victim was a peace officer.

G. Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

APPENDIX B

Arizona Trial and Supreme Court Treatment of the (F)(6) Aggravating Circumstance, 1974-1989

The following abbreviations and notations are used in the tables that follow:

(F)(6):	A finding by a court of one or more of the components of the aggravating circumstance in Ariz. Rev. Stat. § 13-703(F)(6), which provides that "[t]he defendant committed the offense in an especially heinous, cruel or depraved manner."
HCD:	A finding by a court pursuant to Ariz. Rev. Stat. § 13-703 that a particular first degree murder was "especially heinous, cruel or depraved" or "especially heinous, cruel, and depraved."
H/D:	A finding by a court pursuant to Ariz. Rev. Stat. § 13-703 that a particular first degree murder was "heinous," "depraved," "heinous or depraved," or "heinous and depraved."
C:	A finding by a court pursuant to Ariz. Rev. Stat. § 13-703 that a particular first degree murder was "cruel."

Az. S. Ct. and Ct.:	**The Arizona Supreme Court.**
*	**Prisoners currently on death row in Arizona, including those whose sentences have been reversed in orders not yet final.**
+	**Facts drawn from decision in codefendant's case that are incorporated by reference in indicated decision.**

Appendix B consists of a comprehensive table (Table B-1) on pages B-3 to B-16, and three summary tables (Tables B-2, B-3 and B-4). Note that the order of the summary tables is reversed:

Table B-2 ..... page B-19
Table B-3 ..... page B-18
Table B-4 ..... page B-17

TABLE B-1: SUMMARY OF ARIZONA TRIAL AND SUPREME COURT TREATMENT OF THE (F)(6) AGGRAVATING CIRCUMSTANCE, 1974-1989
(pages B-3 to B-16)

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
Cases in which the Trial Court Imposed a Death Sentence that the Arizona Supreme Court Reviewed and in which the Supreme Court Noted the Aggravating Circumstance(s) Found by Trial Court, 1974-1989	Trial Court Found (F)(6) Aggravating Circumstance				Az. S. Ct. Reviewed (F)(6) Finding	After Reviewing (F)(6) Aggravating Circumstance, Supreme Court Let Stand:				Az. S. Ct. Cited Dictionary Definitions of H/D	Az. S. Ct. Cited "Above Norm" or Analogous Language	Az. S. Ct. Cited Gretzler in Reviewing H/D	Arizona Supreme Court Relied on Non-Gretzler Factors in Reviewing H/D in Cases Decided After State v. Gretzler, 659 P.2d 1 (1983)
	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
Watson, 559 P.2d 121 (1976)													
Lee, 559 P.2d 657 (1976)													
*Richmond, 560 P.2d 41 (1976)	X	X			X	X	X			X			
*Blazak, 560 P.2d 54 (1977)	X	X			X	X	X						
Jordan, 561 P.2d 1224 (1976)													
Knapp, 562 P.2d 704 (1977)	X	X			X	X	X			X	X		
Holsinger, 563 P.2d 888 (1977)													

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
Cases in which the Trial Court Imposed a Death Sentence that the Arizona Supreme Court Reviewed and in which the Supreme Court Noted the Aggravating Circumstance(s) Found by Trial Court, 1974-1989	Trial Court Found (F)(6) Aggravating Circumstance				Az. S. Ct. Reviewed (F)(6) Finding	After Reviewing (F)(6) Aggravating Circumstance, Supreme Court Let Stand:				Az. S. Ct. Cited Dictionary Definitions of H/D	Az. S. Ct. Cited "Above Norm" or Analogous Language	Az. S. Ct. Cited Gretzler in Reviewing H/D	Arizona Supreme Court Relied on Non-Gretzler Factors in Reviewing H/D in Cases Decided After State v. Gretzler, 659 P.2d 1 (1983)
	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
*Ceja, 565 P.2d 1274 (1977)	X	X			X	X	X			X	X		
Doss, 568 P.2d 1054 (1977)													
*Bishop, 576 P.2d 122 (1978)	X	X			X	X	X						
*Arnett, 579 P.2d 542 (1978)													
Evans, 584 P.2d 1149 (1978)													
Watson, 586 P.2d 1253 (1978)	X	X			X					X	X		
Brookover, 601 P.2d 1322 (1979)	X	X			X					X	X		

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
Cases in which the Trial Court Imposed a Death Sentence that the Arizona Supreme Court Reviewed and in which the Supreme Court Noted the Aggravating Circumstance(s) Found by Trial Court, 1974-1989	Trial Court Found (F)(6) Aggravating Circumstance				Az. S. Ct. Reviewed (F)(6) Finding	After Reviewing (F)(6) Aggravating Circumstance, Supreme Court Let Stand:				Az. S. Ct. Cited Dictionary Definitions of H/D	Az. S. Ct. Cited "Above Norm" or Analogous Language	Az. S. Ct. Cited Gretzler in Reviewing H/D	Arizona Supreme Court Relied on Non-Gretzler Factors in Reviewing H/D in Cases Decided After State v. Gretzler, 659 P.2d 1 (1983)
	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
Lujan, 604 P.2d 629 (1979)	X	X			X					X	X		
*Arnett, 608 P.2d 778 (1980)													
*Mata, 609 P.2d 48 (1980)	X	X			X	X	X						
Madsen, 609 P.2d 1046 (1980)	X			X	X					X	X		
Steelman, 612 P.2d 475 (1980)	X	X			X	X	X			X	X		
*Ceja, 612 P.2d 491 (1980)	X	X			X	X			X	X	X		
Jordan, 614 P.2d 825 (1980)	X	X			X	X	X						

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
Cases in which the Trial Court Imposed a Death Sentence that the Arizona Supreme Court Reviewed and in which the Supreme Court Noted the Aggravating Circumstance(s) Found by Trial Court, 1974-1989	Trial Court Found (F)(6) Aggravating Circumstance				Az. S. Ct. Reviewed (F)(6) Finding	After Reviewing (F)(6) Aggravating Circumstance, Supreme Court Let Stand:				Az. S. Ct. Cited Dictionary Definitions of H/D	Az. S. Ct. Cited "Above Norm" or Analogous Language	Az. S. Ct. Cited Gretzler in Reviewing H/D	Arizona Supreme Court Relied on Non-Gretzler Factors in Reviewing H/D in Cases Decided After State v. Gretzler, 659 P.2d 1 (1983)
	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
*Clark, 616 P.2d 888 (1980)	X	X			X	X			X	X			
*Bishop, 622 P.2d 478 (1980)	X	X			X	X			X				
*Greenawalt, 624 P.2d 828 (1981)	X	X											
Watson, 628 P.2d 943 (1981)													
*Vickers, 633 P.2d 315 (1981)	X	X			X	X	X			X	X		
*R.W. Tison, 633 P.2d 335 (1981)	X	X			X	X	X			X			
*R.C. Tison, 633 P.2d 355 (1981)	X			X	X	X			X				

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
Cases in which the Trial Court Imposed a Death Sentence that the Arizona Supreme Court Reviewed and in which the Supreme Court Noted the Aggravating Circumstance(s) Found by Trial Court, 1974-1989	Trial Court Found (F)(6) Aggravating Circumstance				Az. S. Ct. Reviewed (F)(6) Finding	After Reviewing (F)(6) Aggravating Circumstance, Supreme Court Let Stand:				Az. S. Ct. Cited Dictionary Definitions of H/D	Az. S. Ct. Cited "Above Norm" or Analogous Language	Az. S. Ct. Cited Gretzler in Reviewing H/D	Arizona Supreme Court Relied on Non-Gretzler Factors in Reviewing H/D in Cases Decided After State v. Gretzler, 659 P.2d 1 (1983)
	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
Britson, 636 P.2d 628 (1981)													
*J. Smith, 638 P.2d 696 (1981)	X	X			X	X	X						
*Ortiz, 639 P.2d 1020 (1981)	X	X			X	X			X	X	X		
*Blazak, 643 P.2d 694 (1982)	X	X			X						X		
Valencia, 645 P.2d 239 (1982)													
*Poland & Poland, 645 P.2d 784 (1982)	X	X			X					X			
*Woratzeck, 657 P.2d 865 (1983)	X	X			X	X			X	X	X		

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
Cases in which the Trial Court Imposed a Death Sentence that the Arizona Supreme Court Reviewed and in which the Supreme Court Noted the Aggravating Circumstance(s) Found by Trial Court, 1974-1989	Trial Court Found (F)(6) Aggravating Circumstance				Az. S. Ct. Reviewed (F)(6) Finding	After Reviewing (F)(6) Aggravating Circumstance, Supreme Court Let Stand:				Az. S. Ct. Cited Dictionary Definitions of H/D	Az. S. Ct. Cited "Above Norm" or Analogous Language	Az. S. Ct. Cited Gretzler in Reviewing H/D	Arizona Supreme Court Relied on Non-Gretzler Factors in Reviewing H/D in Cases Decided After State v. Gretzler, 659 P.2d 1 (1983)
	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
Rumsey, 665 P.2d 48 (1983)													
McDaniel, 665 P.2d 70 (1983)	X	X			X	X	X					X	
*Adamson, 665 P.2d 972 (1983)	X	X			X	X	X				X		
*R.L. Smith, 665 P.2d 995 (1983)													
*Richmond, 666 P.2d 57 (1983)	X	X			X					X	X	X	
*Harding, 670 P.2d 383 (1983)	X	X			X	X			X		X	X	
*Lambright, 673 P.2d 1 (1983)	X	X			X	X	X					X	Manner of disposal of body.

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
Cases in which the Trial Court Imposed a Death Sentence that the Arizona Supreme Court Reviewed and in which the Supreme Court Noted the Aggravating Circumstance(s) Found by Trial Court, 1974-1989	Trial Court Found (F)(6) Aggravating Circumstance				Az. S. Ct. Reviewed (F)(6) Finding	After Reviewing (F)(6) Aggravating Circumstance, Supreme Court Let Stand:				Az. S. Ct. Cited Dictionary Definitions of H/D	Az. S. Ct. Cited "Above Norm" or Analogous Language	Az. S. Ct. Cited Gretzler in Reviewing H/D	Arizona Supreme Court Relied on Non-Gretzler Factors in Reviewing H/D in Cases Decided After State v. Gretzler, 659 P.2d 1 (1983)
	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
*R.D. Smith, 673 P.2d 17 (1983)	X	X			X	X		X					
*Summerlin, 675 P.2d 686 (1983)	X	X			X	X	X					X	Sexual assault contemporaneous with killing.
*McCall, 677 P.2d 920 (1983)	X	X			X	X	X			X		X	(1) Killing committed to "send message to others" in defendant's business; (2) "vile state of mind at the time of the murder."
*Libberton, 685 P.2d 1284 (1984)	X	X			X	X	X						
*James, 685 P.2d 1293 (1984)	X	X			X	X	X			X		X	No compassion or remorse.
*Fisher, 686 P.2d 750 (1984)	X			X	X	X			X				Victim displayed "generosity and concern" to defendant prior to killing.
*Chaney, 686 P.2d 1265 (1984)	X	X			X	X	X						"[C]omplete disregard for the victim's life."

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
Cases in which the Trial Court Imposed a Death Sentence that the Arizona Supreme Court Reviewed and in which the Supreme Court Noted the Aggravating Circumstance(s) Found by Trial Court, 1974-1989	Trial Court Found (F)(6) Aggravating Circumstance				Az. S. Ct. Reviewed (F)(6) Finding	After Reviewing (F)(6) Aggravating Circumstance, Supreme Court Let Stand:				Az. S. Ct. Cited Dictionary Definitions of H/D	Az. S. Ct. Cited "Above Norm" or Analogous Language	Az. S. Ct. Cited Gretzler in Reviewing H/D	Arizona Supreme Court Relied on Non-Gretzler Factors in Reviewing H/D in Cases Decided After State v. Gretzler, 659 P.2d 1 (1983)
	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
*Harding, 687 P.2d 1247 (1984)	X	X			X	X	X						
*R.L. Smith, 687 P.2d 1265 (1984)	X			X	X							X	(1) "[C]old-blooded" murder; (2) "complete lack of understanding of the value of human life."
*Villafuerte, 690 P.2d 42 (1984)	X	X			X	X			X			X	(1) "[P]erverse" method of killing; (2) killing to facilitate escape; (3) defendant did not tell police of bound victim's condition for 48 hours.
*Clabourne, 690 P.2d 54 (1984)	X	X			X	X	X					X	Sexual assault contemporaneous with killing.
*Gillies, 691 P.2d 655 (1984)	X	X			X	X	X						"[S]avage manner of death."
Hensley, 691 P.2d 689 (1984)													
*McMurtrey, 691 P.2d 1099 (1984)													

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
Cases in which the Trial Court Imposed a Death Sentence that the Arizona Supreme Court Reviewed and in which the Supreme Court Noted the Aggravating Circumstance(s) Found by Trial Court, 1974-1989	Trial Court Found (F)(6) Aggravating Circumstance				Az. S. Ct. Reviewed (F)(6) Finding	After Reviewing (F)(6) Aggravating Circumstance, Supreme Court Let Stand:				Az. S. Ct. Cited Dictionary Definitions of H/D	Az. S. Ct. Cited "Above Norm" or Analogous Language	Az. S. Ct. Cited Gretzler in Reviewing H/D	Arizona Supreme Court Relied on Non-Gretzler Factors in Reviewing H/D in Cases Decided After State v. Gretzler, 659 P.2d 1 (1983)
	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
*Carriger, 692 P.2d 991 (1984)	X	X			X	X	X			X		X	Victim uncertain as to ultimate fate prior to death.
*Nash, 694 P.2d 222 (1985)													
*P. Poland, 698 P.2d 183 (1985)	X	X			X					X	X		
*M. Poland, 698 P.2d 207 (1985)	X	X			X					X	X		
*Roscoe, 700 P.2d 1312 (1984)	X	X			X	X	X			X			(1) Young victim; (2) killing "repugnant civilized society."
*Martinez-Villareal, 702 P.2d 670 (1985)	X			X	X	X			X	X		X	"[M]anifest disregard for the fundamental principles upon which our society is based."

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
Cases in which the Trial Court Imposed a Death Sentence that the Arizona Supreme Court Reviewed and in which the Supreme Court Noted the Aggravating Circumstance(s) Found by Trial Court, 1974-1989	Trial Court Found (F)(6) Aggravating Circumstance				Az. S. Ct. Reviewed (F)(6) Finding	After Reviewing (F)(6) Aggravating Circumstance, Supreme Court Let Stand:				Az. S. Ct. Cited Dictionary Definitions of H/D	Az. S. Ct. Cited "Above Norm" or Analogous Language	Az. S. Ct. Cited Gretzler in Reviewing H/D	Arizona Supreme Court Relied on Non-Gretzler Factors in Reviewing H/D in Cases Decided After State v. Gretzler, 659 P.2d 1 (1983)
	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
*Bracy, 703 P.2d 464 (1985)	X	X			X	X	X			X		X	(1) Victims uncertain as to ultimate fate prior to death; (2) elderly victim.
*Hooper, 703 P.2d 482 (1985)	X	X			X	X	X			X			+Same.
*Rossi, 706 P.2d 371 (1985)	X	X			X	X	X					X	(1) Witness elimination; (2) crime committed "totally without regard for human life;" (3) use of special bullets.
*B. Smith, 707 P.2d 289 (1985)	X	X			X					X	X	X	-
Tittle, 710 P.2d 449 (1985)													
Johnson, 710 P.2d 1050 (1985)	X			X	X						X		
*Correll, 715 P.2d 721 (1986)	X	X			X	X	X				X	X	(1) Witness elimination; (2) crime committed with "total disregard for human life."

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
Cases in which the Trial Court Imposed a Death Sentence that the Arizona Supreme Court Reviewed and in which the Supreme Court Noted the Aggravating Circumstance(s) Found by Trial Court, 1974-1989	Trial Court Found (F)(6) Aggravating Circumstance				Az. S. Ct. Reviewed (F)(6) Finding	After Reviewing (F)(6) Aggravating Circumstance, Supreme Court Let Stand:				Az. S. Ct. Cited Dictionary Definitions of H/D	Az. S. Ct. Cited "Above Norm" or Analogous Language	Az. S. Ct. Cited Gretzler in Reviewing H/D	Arizona Supreme Court Relied on Non-Gretzler Factors in Reviewing H/D in Cases Decided After State v. Gretzler, 659 P.2d 1 (1983)
	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
Castaneda, 724 P.2d 1 (1986)	X	X			X	X	X				X	X	Victim uncertain as to ultimate fate prior to death.
*McMurtrey, 726 P.2d 202 (1986)													
*Wallace, 728 P.2d 232 (1986)	X	X			X	X			X	X		X	(1) Lying in wait; (2) "disregard for human life;" (3) young victims; (4) defendant eschewed "less violent alternatives [that] were readily available."
*K. LaGrand, 733 P.2d 1066 (1987)	X	X			X	X	X					X	"[C]allous disregard for human worth."
*W. LaGrand, 734 P.2d 563 (1987)	X	X			X	X	X					X	+Same.
*Williams, 1987 Westlaw 878													
*Moorman, 744 P.2d 679 (1987)	X	X			X	X	X				X		"[M]atricide."

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
Cases in which the Trial Court Imposed a Death Sentence that the Arizona Supreme Court Reviewed and in which the Supreme Court Noted the Aggravating Circumstance(s) Found by Trial Court, 1974-1989	Trial Court Found (F)(6) Aggravating Circumstance				Az. S. Ct. Reviewed (F)(6) Finding	After Reviewing (F)(6) Aggravating Circumstance, Supreme Court Let Stand:				Az. S. Ct. Cited Dictionary Definitions of H/D	Az. S. Ct. Cited "Above Norm" or Analogous Language	Az. S. Ct. Cited Gretzler in Reviewing H/D	Arizona Supreme Court Relied on Non-Gretzler Factors in Reviewing H/D in Cases Decided After State v. Gretzler, 659 P.2d 1 (1983)
	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
*Beaty, 762 P.2d 519 (1988)	X	X			X	X	X			X	X		(1) Manner of disposal of body; (2) young victim; (3) killing "repugnant to a civilized society."
Mauro, 766 P.2d 59 (1988)	X	X											
*Vickers, 768 P.2d 1177 (1989)	X	X			X	X	X				X	X	
*Walton, 769 P.2d 1017 (1989)	X	X			X	X	X			X		X	
*McCall, 770 P.2d 1165 (1989)	X	X			X	X	X						
Prince, 772 P.2d 1121 (1989)													

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
Cases in which the Trial Court Imposed a Death Sentence that the Arizona Supreme Court Reviewed and in which the Supreme Court Noted the Aggravating Circumstance(s) Found by Trial Court, 1974-1989	Trial Court Found (F)(6) Aggravating Circumstance				Az. S. Ct. Reviewed (F)(6) Finding	After Reviewing (F)(6) Aggravating Circumstance, Supreme Court Let Stand:				Az. S. Ct. Cited Dictionary Definitions of H/D	Az. S. Ct. Cited "Above Norm" or Analogous Language	Az. S. Ct. Cited Gretzler in Reviewing H/D	Arizona Supreme Court Relied on Non-Gretzler Factors in Reviewing H/D in Cases Decided After State v. Gretzler, 659 P.2d 1 (1983)
	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
*Wallace, 773 P.2d 983 (1989)	X			X	X	X			X		X	X	(1) "[T]otal disregard for human life;" (2) young victims.
Rockwell, 775 P.2d 1069 (1989)													
*Fulminante, 778 P.2d 602 (1988)	X	X			X	X	X			X	X		Defendant "violated the special parental relationship."
*Bishop, 1989 Westlaw 73451	X	X											
Marlow, 1989 Westlaw 135110	X			X	X	X			X				Witness elimination.
Total Cases (94 Cases Charted)	72	63	0	9	69	56	40	1	15	33	31	24	28

TABLE B-4: SUMMARY OF ARIZONA SUPREME COURT'S POST-GRETZLER TREATMENT OF (F)(6) CIRCUMSTANCE (Summarizing Columns (7) and (8) of Table B-1)

	Arizona Supreme Court After Gretzler Reviewed (F)(6) Finding	Az. S. Ct. After Gretzler Cited Gretzler in Reviewing H/D	Az. S. Ct. After Gretzler Relied on Non-Gretzler Factors in Reviewing H/D
All Reviewed Cases	45	24	28
Percent** of All Reviewed Cases	100%	53%	62%
All Reviewed Cases of Prisoners on Death Row	40	22	26
Percent of All Reviewed Cases of Prisoners on Death Row	100%	55%	65%

**All percentage figures rounded to nearest whole number.

TABLE B-3: SUMMARY OF ARIZONA SUPREME COURT TREATMENT OF (F)(6) AGGRAVATING CIRCUMSTANCE
(Summarizing Columns (3)-(7) of Table B-1)

	Arizona Supreme Court Reviewed (F)(6) Finding	After Reviewing (F)(6) Aggravating Circumstance, Arizona Supreme Court Let Stand:				Az. S. Ct. Cited Dictionary Definitions of H/D	Az. S. Ct. Cited "Above Norm" or Analogous Language	Az. S. Ct. Cited Gretzler in Reviewing H/D
		(F)(6):	HCD	C only	H/D			
All Reviewed Cases	69	56	40	1	15	33	31	24
Percent** of All Reviewed Cases	100%	81%	58%	1%	22%	48%	45%	35%
All Reviewed Cases of Prisoners Currently on Death Row	57	50	35	1	14	26	23	22
Percent of All Reviewed Cases of Prisoners Currently on Death Row	100%	88%	61%	2%	25%	46%	40%	39%

**All percentage figures rounded to nearest whole number.

TABLE B-2: SUMMARY OF ARIZONA TRIAL COURT TREATMENT OF (F)(6) AGGRAVATING CIRCUMSTANCE (Summarizing Columns (1), (2) of Table B-1)

	Cases in which the Trial Court Imposed a Death Sentence that the Arizona Supreme Court Reviewed and in which the Supreme Court Noted the Aggravating Circumstance(s) Found by Trial Court, 1974-1989	Trial Court Found (F)(6) Aggravating Circumstance			
		(F)(6):	HCD	C only	H/D
All Charted Cases	94	72	63	0	9
Percent** of All Charted Cases	100%	77%	67%	0%	10%
All Charted Cases of Prisoners Currently on Death Row	67	59	53	0	6
Percent of All Charted Cases of Prisoners Currently on Death Row	100%	88%	79%	0%	9%

**All percentage figures rounded to nearest whole number.

Supreme Court, U.S.
FILED
FEB 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-189

In The

Supreme Court of the United States

October Term, 1989

SAMUEL A. LEWIS, Director, Arizona Department of Corrections, and DONALD WAWRZASZEK, Superintendent, Arizona State Prison,

Petitioners,

vs.

JIMMIE WAYNE JEFFERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

ROBERT K. CORBIN
Attorney General of
the State of Arizona

JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division

*GERALD R. GRANT
Assistant Attorney General
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542-4686

Attorneys for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Where a federal court has determined that a state court has adopted a constitutionally narrow definition of an aggravating circumstance in a capital case, may the federal court make a de novo review of the evidence supporting the state court's finding of that aggravating circumstance?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CASES AND AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT

THE NINTH CIRCUIT ERRONEOUSLY SET ASIDE RESPONDENT'S DEATH SENTENCE BASED ON ITS FINDING THAT THE EVIDENCE DID NOT SUPPORT THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS "ESPECIALLY HEINOUS AND DEPRAVED." 4

CONCLUSION 13

APPENDIX A A-1

TABLE OF CASES AND AUTHORITIES

Page

CASES

Godfrey v. Georgia,
446 U.S. 420
100 S. Ct. 1759
64 L. Ed. 2d 398 (1980) 8, 10, 12

Lowenfield v. Phelps,
484 U.S. 231
108 S. Ct. 546
48 L. Ed. 2d 568 (1988) 7

Maynard v. Cartwright,
486 U.S. 356
108 S. Ct. 1853
100 L. Ed. 2d 372 (1988) 8, 9, 12

Pulley v. Harris,
465 U.S. 37
104 S. Ct. 871
79 L. Ed. 2d 29 (1984) 8

State v. Gretzler,
135 Ariz. 42
659 P.2d 1 (1983) 8, 11

State v. Rockwell,
161 Ariz. 5
775 P.2d 1069 (1989) 10

State v. Smith,
131 Ariz. 29
638 P.2d 696 (1982) 10

State v. Vickers,
159 Ariz. 532
768 P.2d 1177 (1989) 10

State v. Watson,
129 Ariz. 60
628 P.2d 943 (1978) 10

TABLE OF CASES AND AUTHORITIES – Continued

Page

AUTHORITIES

Arizona Revised Statutes Annotated

§ 13-452 7

§ 13-455 7

§ 13-456 7

§§ 13-1102 to -1105 7

Arizona Rules of Criminal Procedure Rule 32.5(b)(2) 11

Louisiana Revised Statutes Annotated § 14:29 (West 1986) 7

Rules of the Supreme Court Rule 14.1(a) 6

STATEMENT OF THE CASE

Respondent's guilt is not an issue in this case. In his recitation of the facts, however, respondent seems unaware of this. He portrays himself as the faithful and long-suffering lover of Penelope Cheney. He portrays Ms. Cheney as a despicable person who deserved to be killed. Respondent also attacks the credibility of the state's witnesses,[1] suggests that Ms. Cheney's death was accidental,[2] and fails to mention his attempt to hire a man to kill Ms. Cheney. Respondent's heavy reliance on his own trial testimony is misplaced because the jury necessarily rejected that testimony by returning guilty verdicts.

In the Ninth Circuit, respondent made numerous attacks on his death sentence. Two of those attacks were that the especially heinous or depraved aggravating circumstance "is unconstitutionally vague and overbroad" on its face and that the circumstance was vague and overbroad as applied to him. (Opening Brief of Appellant at 50-58.) The Ninth Circuit rejected respondent's claim that the circumstance was "unconstitutionally vague and overbroad" on its face:

> His argument that the statute is void on its face is foreclosed by our decision in *Chaney v. Lewis*, 801 F.2d 1191, 1194-96 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1911 (1987). There, we rejected a similar challenge to the same statute, pointing out that "[a]lthough the statutory language is broad, as any murder could be considered cruel, heinous, or depraved, the Arizona Supreme

---

[1] Brief of Respondent at 4, fn. 2; *Id.* at 5-6, fn. 3.

[2] *Id.* at 6, fn. 4.

Court need not construe the statute open-endedly." *Id.* at 1195.

. . . .

In *Chaney*, we also stated that "[t]he Arizona Supreme Court appears to have sufficiently channeled sentencing discretion to prevent arbitrary and capricious capital sentencing decisions." *Chaney*, 801 F.2d at 1195. Finally, we held that the death sentence imposed upon Chaney was consistent with the Arizona law as established by the Arizona Supreme Court: the murder was cruel because the victim suffered greatly, and was depraved because Chaney's helpless victim (a sheriff's deputy) was shot in the back when Chaney could have made his escape without again shooting the victim. *Id.*

While Chaney establishes that the Arizona statute is not void on its face and is capable of constitutional application, it naturally does not answer the question whether the Arizona statute was constitutionally applied to Jeffers in this case.

(Appendix to Petition for Writ of Certiorari at A-24 to A-26, emphasis added.) The Ninth Circuit then proceeded to find that the circumstance was vague as applied to respondent. (*Id.* at A-26 to A-45.)[3]

Respondent filed no petition for rehearing in the Ninth Circuit. In his response to the state's petition for

[3] The Ninth Circuit rejected two of respondent's other sentencing issues (biased sentencing judge and jury determinations of aggravating and mitigating circumstances) and declined to rule on the remainder. (*Id.* at A-21 to A-23, A-45, fn. 11.)

rehearing and suggestion for rehearing en banc, respondent acknowledged that the Ninth Circuit had rejected his "overbroad on its face" claim:

> The instant case does *not* involve the broad question of whether the aggravating circumstance "especially cruel, heinous or depraved" is facially unconstitutional. The decision of the panel held that this issue was "foreclosed by our decision in *Chaney v. Lewis*, 801 F.2d 1191, 1194-96 (9th Cir. 1986). . . ."

(Petitioner-Appellant's Response to Petition for Rehearing with Suggestion for Rehearing En Banc at 4, emphasis in original.) The Ninth Circuit deferred consideration of the petition for rehearing "pending a further decision of this court, sitting en banc, in *Adamson v. Ricketts*. . . ." (Order, filed Mar. 30, 1988.) When the Ninth Circuit later denied the petition for rehearing and rejected the suggestion for a rehearing en banc, it made no reference to *Adamson* and did not modify the panel's opinion.

Respondent filed no cross-petition for writ of certiorari. In responding to the state's petition, respondent made no claim that the Ninth Circuit had wrongly decided his "overbroad on its face" issue or that the Ninth Circuit had actually decided that issue in his favor.

SUMMARY OF ARGUMENT

Respondent's brief serves to emphasize the importance of the issue in this case. The position of respondent and the Ninth Circuit is that, where a state inmate brings a collateral attack on his death sentence, the federal courts are empowered and required to scrutinize in

detail, including comparing the case with all other capital cases from that state, every step taken by the state court in imposing the death sentence.

Petitioners maintain that the scope of federal review is not so broad. In this case, where it had concluded that Arizona had adopted a constitutionally adequate narrowing construction of the especially heinous or depraved aggravating circumstance, the Ninth Circuit exceeded its authority by holding that the evidence did not support the state court's finding that the murder was especially heinous and depraved. That is the issue upon which this Court granted certiorari. Respondent's labelling of the issue as "spurious" does not change the facts of this case.

ARGUMENT

THE NINTH CIRCUIT ERRONEOUSLY SET ASIDE RESPONDENT'S DEATH SENTENCE BASED ON ITS FINDING THAT THE EVIDENCE DID NOT SUPPORT THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS "ESPECIALLY HEINOUS AND DEPRAVED."

A. Respondent Is Not Entitled to Relief on His Claim that Arizona's Especially Heinous and Depraved Aggravating Circumstance Is Unconstitutional on Its Face.

Respondent devotes the major portion of his brief to attacking the facial validity of the especially heinous and depraved aggravating circun stance. He does this despite the fact that the Ninth Circui rejected this claim, that he never sought a rehearing in the Ninth Circuit, and that he never cross-petitioned for certiorari.

Respondent presents a number of theories to support his claim that this issue, which this Court did not grant certiorari on, is properly before this Court. He first asserts that the Ninth Circuit panel never held that the aggravating circumstance was not void on its face. The words of the opinion contradict that notion. (Appendix to Petition for Writ of Certiorari at A-24 to A-26.) Respondent acknowledged this in his response to the state's petition for rehearing. (Petitioner-Appellant's Response to Petition for Rehearing with Suggestion for Rehearing En Banc at 4.)

He next argues that, in denying the state's petition for rehearing, the Ninth Circuit modified the panel's opinion to hold that the circumstance was void on its face. This is sheer confabulation. The order denying the petition for rehearing makes no mention of this issue and in no way modifies the panel's opinion. If the Ninth Circuit had intended to do anything other than deny the petition for rehearing it would have said so.

Respondent also asserts that he may defend the Ninth Circuit's judgment on any ground which the law and the record permit, provided the asserted ground would not "expand the relief" which has been granted. Thus, according to respondent's logic, he is entitled to raise in this Court any of the sentencing issues he presented in the Ninth Circuit, including those the Ninth Circuit declined to rule on, because they would not "expand the relief" granted by the Ninth Circuit. The relief granted by the Ninth Circuit was that respondent's death sentence was set aside. Respondent's "facial invalidity" ground and many of his other sentencing issues would "expand the relief" granted by striking

down the entire especially heinous, cruel or depraved circumstance or the entire death penalty statute. Further, respondent does not account for Rule 14.1(a), Rules of the Supreme Court, which provides in pertinent part:

> The statement of any question presented [in a petition for writ of certiorari] will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition, or fairly included therein, will be considered by the Court.

The "overbroad as applied" issue is a subsidiary question fairly included in the "overbroad on its face" issue, not vice versa.

Even assuming that respondent's "overbroad on its face" issue is before this Court, it does not merit relief from this Court. Respondent's analysis presumes that the constitutionally required "narrowing function" of a state's capital punishment scheme must take place at the sentencing phase. This Court has held otherwise:

> [T]he narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.
>
> . . . .
>
> There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more.

Lowenfield v. Phelps, 108 S. Ct. 546, 555 (1988) (citations omitted).

Louisiana has established five grades of homicide while Arizona has established four. *Compare* La. Rev. Stat. Ann. § 14:29 (West 1986) and Ariz. Rev. Stat. Ann. §§ 13-1102 to -1105.[4] Both states restrict application of the death penalty to those convicted of first-degree murder. A comparison of Louisiana's definition of first-degree murder with Arizona's shows that, while the classes are not congruent, each state significantly narrows the class of murderers eligible for the death penalty. While some defendants who would be guilty of first-degree murder in Arizona would not be guilty of first-degree murder in Louisiana, others who would be guilty in Louisiana would not be in Arizona. Petitioners submit that Arizona, just as much as Louisiana, complies with the required narrowing function by its narrow definition of capital offenses. Then, by its sentencing scheme, Arizona goes on to provide a constitutional method of distinguishing those who receive the death penalty from those who do not.

In addition, respondent's concept of the appropriate scope of federal review in determining whether an aggravating circumstance performs the required narrowing function finds no support in this Court's decisions. In

---

[4] Slightly different versions of these statutes were in effect at the time of respondent's trial. *See* former Ariz. Rev. Stat. Ann. §§ 13-452, -455, and -456.

neither *Maynard v. Cartwright*, 486 U.S. 356 (1988) nor *Godfrey v. Georgia*, 446 U.S. 420 (1980), did this Court perform the case-by-case comparison or proportionality review that respondent claims is required here. The problem in *Maynard* was that courts had adopted no narrowing construction of the "especially heinous, atrocious, or cruel" aggravating circumstance, which left the sentencing jury with unfettered discretion. The problem in *Godfrey* was that, while the Georgia courts had previously adopted a narrowing construction of their "outrageously vile" circumstance, they failed to apply it in Godfrey's sentencing.

Arizona, unlike Oklahoma in *Maynard*, has adopted a narrowing construction of the "especially heinous, and depraved" aggravating circumstance. *State v. Gretzler*, 659 P.2d 1, 13 (Ariz.), *cert. denied*, 461 U.S. 971 (1983). Arizona, unlike Georgia in *Godfrey*, applied that narrowing construction to respondent. (Joint Appendix at 59-63.) Neither *Maynard* nor *Godfrey* authorizes the wholesale proportionality review of other Arizona decisions in which respondent indulges.

Respondent's proportionality review analysis implies that a capital sentencing scheme must be foolproof. This Court has held otherwise:

> Any capital sentencing scheme may occasionally produce aberrational outcomes. Such inconsistencies are a far cry from the major systemic defects identified in *Furman*. As we have acknowledged in the past, "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.' "

Pulley v. Harris, 465 U.S. 37, 54 (1984).

Respondent argues that Arizona's construction of the terms is not sufficiently narrow because they are not read conjunctively with the term "especially cruel." (Brief of Respondent at 46-48.) As this Court stated in *Maynard*:

> We also do not hold that some kind of torture or serious physical abuse is the only limiting construction of the heinous, atrocious, or cruel aggravating circumstance that would be constitutionally acceptable.

Maynard v. Cartwright, 108 S. Ct. at 1859-60. Arizona's construction, though not conjunctive, sufficiently narrows the meaning of the terms.

He also complains that Arizona's construction of the "especially heinous and depraved" circumstances is merely a "dressed up" version of the same facts (motivation, premeditation, and deliberation) that established his guilt of first-degree murder. (Brief of Respondent at 81-82.) Respondent apparently sees no distinction between a defendant who merely premeditatedly kills his girlfriend by overdosing her with heroin and a defendant who, like respondent, does the same but also strangles her with his hands and a belt, climbs on top of her and beats and curses her, forces another person to inject her with more heroin, and takes photographs of the other person doing so. The distinction between the two is obvious and Arizona's construction properly takes note of that distinction.

Respondent's brief and appendix imply that the Arizona Supreme Court has not constitutionally discharged its review function. A review of its case law shows that the Arizona Supreme Court exercises great care in carrying out its responsibilities. (*See* Appendix A.) The state

court has reviewed 155 death sentences arising out of 147 cases.[5] Of the 155 convictions and death sentences reviewed, the state court has affirmed the conviction and sentence in 85 instances, remanded for new trials in 24 instances, affirmed the conviction but reduced the sentence to life in 20 instances, and remanded for resentencing in 26 instances.

The Arizona Supreme Court reverses death sentences at a rate of 45.2 percent, significantly higher than the 35.6 percent "historic [criminal] reversal rate of state supreme courts." *Godfrey v. Georgia*, 446 U.S. at 453 (White, J., dissenting). There are a number of reasons for this higher rate. First, the Arizona Supreme Court subjects death penalty cases to a higher degree of scrutiny.[6] Second, the court independently, as a trier-of-fact, determines the existence of aggravating and mitigating circumstances.[7] Third, the court independently determines whether it believes the death penalty is appropriate.[8] Fourth, Arizona provides the capital defendant with an attorney in

---

[5] The difference in the total number of sentences and the total number of reported cases occurs because some of the cases involve multiple convictions of first-degree murder and multiple death sentences.

[6] *State v. Vickers*, 768 P.2d 1177, 1182 (Ariz. 1989) (because of sentence imposed, Court considers merits of claim not presented to trial court).

[7] *State v. Smith*, 638 P.2d 696, 700-01 (Ariz. 1982) (Court reviews each case de novo, as a trier-of-fact, to assure the correct application of aggravating circumstances).

[8] *State v. Rockwell*, 775 P.2d 1069, 1080 (Ariz. 1989); *State v. Watson*, 628 P.2d 943, 946 (Ariz. 1978).

all phases of the review process, including post-conviction relief proceedings.[9]

The Arizona Supreme Court applies the same careful review to cases involving the "especially heinous, cruel or depraved" aggravating circumstance. Of the 147 death penalty cases it has reviewed, 61 have involved this circumstance. (*See* Appendix A.) Of those 61 cases, 40 came after the supreme court narrowed the circumstance in *Gretzler*. In 32 of the 40 cases, the trial courts found the "heinous and depraved" circumstance. The supreme court reversed 6 of those findings. (*See* Appendix A.) In 35 of the 40 cases, the trial courts found the "cruel" circumstance. The supreme court reversed 9 of those findings. This shows that the Arizona Supreme Court properly exercises its review function and does not automatically affirm the trial court's sentencing decisions.

B. The Ninth Circuit Applied an Incorrect Standard of Review in Determining that the "Especially Heinous and Depraved" Aggravating Circumstance Could Not Be Constitutionally Applied in this Case.

Respondent's position here is that the "narrowing construction" analysis that federal courts must apply to a state court's definition of an aggravating circumstance applies equally to the state court's determination that the aggravating circumstance exists in a particular case. Respondent therefore engages in a lengthy review of

---

[9] Rule 32.5(b)(2), Ariz. R. Crim. P.

Arizona cases in which the "especially heinous and depraved" circumstance has and has not been applied and, without benefit of the full record of those cases, compares them to the facts in this case.

No decision by this Court authorizes such a review. In *Maynard*, this Court did not base its decision to set aside the death sentence on a comparison of Maynard's conduct with that of any other defendant in Oklahoma. The setting aside of Maynard's sentence was based on Oklahoma's failure to define the aggravating circumstance and the failure to instruct the sentencing jury on the meaning of the circumstance. Similarly, this Court did not set aside the death sentence in *Godfrey* based on its conclusion that Godfrey's conduct fell below that of other defendants. The *Godfrey* decision was based on the failure of the sentencing jury and the Georgia Supreme Court to apply the narrowed construction of the aggravating circumstance to Godfrey's conduct.

Respondent adorns his argument with the rainment of a "narrowing construction" analysis. What he is actually saying is that a federal court has the power to independently review the facts supporting a state court's finding of an aggravating circumstance and come to its own conclusion regarding whether that circumstance exists. Petitioners submit that this exceeds the scope of federal review.

CONCLUSION

Once the Ninth Circuit determined that Arizona had narrowly construed its "especially heinous and depraved" aggravating circumstance, it should not have independently reviewed the evidence supporting the finding of the circumstance. A federal court may not substitute its judgment for that of the state court in this manner. Therefore, petitioners ask this Court to reverse that portion of the Ninth Circuit's decision that set aside respondent's death sentence.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division

GERALD R. GRANT
Assistant Attorney General
(Counsel of Record)
Criminal Division
Department of Law
1275 W. Washington, 1st Floor
Phoenix, Arizona 85007
Telephone: (602) 542-4686

Attorneys for Petitioners

APPENDIX A

ARIZONA DEATH PENALTY CASES
1975 to January 23, 1990

KEY:

a. Cases where Arizona Supreme Court reviewed findings of heinous, cruel or depraved

b. Cases after *Gretzler* where cruelty was found

c. Cases after *Gretzler* where heinous and depraved was found

d. Cases after *Gretzler* where finding of cruelty reversed

e. Cases after *Gretzler* where finding of heinous and depraved reversed

CASES

1. *State v. Verdugo*, 112 Ariz. 288, 541 P.2d 388 (1975).

   Conviction affirmed, sentence reduced to life.

2. *State v. Ceja*, 113 Ariz. 39, 546 P.2d 6 (1976).

   Conviction reversed, remanded for new trial.

3. *State v. Murphy*, 113 Ariz. 416, 555 P.2d 1110 (1976).

   Conviction affirmed, sentence reduced to life.

4. *State v. Watson*, 114 Ariz. 1, 559 P.2d 121 (1976), *cert. denied*, 430 U.S. 986 (1977).

Conviction affirmed, remanded for resentencing.

5. *State v. Lee*, 114 Ariz. 101, 559 P.2d 657 (1976).

Conviction affirmed, remanded for resentencing.

6. *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), *cert. denied*, 433 U.S. 915 (1977).

Conviction and sentence affirmed.

(a) 7. *State v. Blazak*, 114 Ariz. 199, 560 P.2d 54 (1977).

Conviction and sentence affirmed.

8. *State v. Jordan*, 114 Ariz. 452, 561 P.2d 1224 (1976), *vacated*, 438 U.S. 911 (1978).

Conviction and sentence affirmed.

(a) 9. *State v. Knapp*, 114 Ariz. 531, 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908 (1978).

Conviction and sentence affirmed.

10. *State v. Holsinger*, 115 Ariz. 89, 563 P.2d 888 (1977).

Conviction and sentence affirmed.

(a) 11. *State v. Ceja*, 115 Ariz. 413, 565 P.2d 1274, *cert. denied*, 434 U.S. 975 (1977).

Conviction and sentence affirmed.

12. *State v. Doss*, 116 Ariz. 156, 568 P.2d 1054 (1977).

Conviction affirmed, sentence reduced to life.

13. *State v. Treadaway*, 116 Ariz. 163, 568 P.2d 1061 (1977).

Conviction reversed, remanded for new trial.

(a) 14. *State v. Bishop*, 118 Ariz. 263, 576 P.2d 122, *vacated*, 439 U.S. 810 (1978).

Conviction and sentence affirmed.

15. *State v. Arnett*, 119 Ariz. 38, 579 P.2d 542 (1978).

Conviction and sentence affirmed.

16. *State v. Evans*, 120 Ariz. 158, 584 P.2d 1149 (1978).

Conviction affirmed, remanded for resentencing.

17. *State v. Steelman*, 120 Ariz. 301, 585 P.2d 1213 (1978).

Conviction affirmed, remanded for resentencing.

(a) 18. *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, 440 U.S. 924 (1979).

Conviction affirmed, remanded for resentencing.

19. *State v. Morales*, 120 Ariz. 517, 587 P.2d 236 (1978).

Conviction reversed, remanded for new trial.

20. *State v. Melendez*, 121 Ariz. 1, 588 P.2d 294 (1978).

Conviction reversed, remanded for new trial.

21. *State v. Valencia*, 121 Ariz. 191, 589 P.2d 434 (1979).

Conviction affirmed, remanded for resentencing.

22. *State v. Edwards*, 122 Ariz. 206, 594 P.2d 72 (1979), *rev'd*, 451 U.S. 477 (1981).

Conviction affirmed, remanded for resentencing.

23. *State v. Smith (J.C.)*, 123 Ariz. 231, 599 P.2d 187 (1979).

Convictions affirmed, remanded for resentencing.

24. *State v. Carriger*, 123 Ariz. 335, 599 P.2d 788 (1979), *cert. denied*, 444 U.S. 1049 (1980).

Conviction and sentence affirmed.

(a) 25. *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322 (1979).

Conviction affirmed, sentence reduced to life.

26. *State v. Valencia*, 124 Ariz. 139, 602 P.2d 807 (1979).

Conviction affirmed, remanded for resentencing.

(a) 27. *State v. Lujan*, 124 Ariz. 365, 604 P.2d 629 (1979).

Conviction affirmed, sentence reduced to life.

28. *State v. Evans*, 124 Ariz. 526, 606 P.2d 16, *cert. denied*, 449 U.S. 891 (1980).

Resentencing affirmed.

29. *State v. Dunlap*, 125 Ariz. 104, 608 P.2d 41 (1980).

Conviction reversed, remanded for new trial.

30. *State v. Robison*, 125 Ariz. 107, 608 P.2d 44 (1980).

Conviction reversed, remanded for new trial.

31. *State v. Arnett*, 125 Ariz. 201, 608 P.2d 778 (1980).

Resentencing affirmed.

(a) 32. *State v. Mata (Luis)*, 125 Ariz. 233, 609 P.2d 48, *cert. denied*, 449 U.S. 938 (1980).

Conviction and sentence affirmed.

(a) 33. *State v. Madsen*, 125 Ariz. 346, 609 P.2d 1046, *cert. denied*, 449 U.S. 873 (1980).

Conviction affirmed, sentence reduced to life.

34. *State v. Smith (Sylvester)*, 125 Ariz. 412, 610 P.2d 46 (1980).

Conviction and sentence affirmed.

35. *State v. Knapp*, 125 Ariz. 503, 611 P.2d 90 (1979).

Resentencing affirmed.

(a) 36. *State v. Steelman*, 126 Ariz. 19, 612 P.2d 475, *cert. denied*, 449 U.S. 913 (1980).

Resentencing affirmed.

(a) 37. *State v. Ceja*, 126 Ariz. 35, 612 P.2d 491 (1980).

Resentencing affirmed.

38. *State v. Gretzler*, 126 Ariz. 60, 612 P.2d 1023 (1980).

Conviction affirmed, remanded for resentencing.

39. *State v. Jordan*, 126 Ariz. 283, 614 P.2d 825, *cert. denied*, 449 U.S. 986 (1980).

Resentencing affirmed.

(a) 40. *State v. Clark*, 126 Ariz. 428, 616 P.2d 888, *cert. denied*, 449 U.S. 1067 (1980).

Conviction and sentence affirmed.

41. *State v. McDaniel*, 127 Ariz. 13, 617 P.2d 1129 (1980).

Conviction reversed, remanded for new trial.

42. *State v. McVay*, 127 Ariz. 450, 622 P.2d 9 (1980).

Conviction reversed, remanded for new trial.

(a) 43. *State v. Bishop*, 127 Ariz. 531, 622 P.2d 478 (1980).

Resentencing affirmed.

44. *State v. Greenawalt*, 128 Ariz. 150, 624 P.2d 828, *cert. denied*, 454 U.S. 882 (1981).

Conviction and sentence affirmed.

45. *State v. Watson*, 129 Ariz. 60, 628 P.2d 943 (1981), *cert. denied*, 456 U.S. 981 (1982).

Conviction affirmed, sentence reduced to life.

(a) 46. *State v. Vickers*, 129 Ariz. 506, 633 P.2d 315 (1981) Conviction and sentence affirmed.

(a) 47. *State v. Tison (Ricky)*, 129 Ariz. 526, 633 P.2d 335 (1981), *cert. denied*, 459 U.S. 882 (1982).

Conviction and sentence affirmed.

(a) 48. *State v. Tison (Raymond)*, 129 Ariz. 546, 633 P.2d 355 (1981), *cert. denied*, 459 U.S. 882 (1982).

Conviction and sentence affirmed.

49. *State v. Schad*, 129 Ariz. 557, 633 P.2d 366 (1981), *cert. denied*, 455 U.S. 983 (1982).

Conviction and sentence affirmed.

50. *State v. Britson*, 130 Ariz. 380, 636 P.2d 628 (1981).

Conviction and sentence affirmed.

51. *State v. Rumsey*, 130 Ariz. 427, 636 P.2d 1209 (1981).

Conviction affirmed, life sentence vacated, remanded for resentencing.

(a) 52. *State v. Smith (J.C.)*, 131 Ariz. 29, 638 P.2d 696 (1981).

Resentencings affirmed.

(a) 53. *State v. Ortiz*, 131 Ariz. 195, 639 P.2d 1020 (1981), *cert. denied*, 456 U.S. 984 (1982).

Conviction and sentence affirmed.

54. *State v. Emery*, 131 Ariz. 493, 642 P.2d 838 (1982).

Conviction reversed, remanded for new trial.

(a) 55. *State v. Blazak*, 131 Ariz. 598, 643 P.2d 694, *cert. denied*, 459 U.S. 882 (1982).

Resentencing affirmed.

56. *State v. Valencia*, 132 Ariz. 248, 645 P.2d 239 (1982).

Conviction affirmed, sentence reduced to life.

(a) 57. *State v. Poland*, 132 Ariz. 269, 645 P.2d 784 (1982).

Conviction reversed, remanded for new trial.

58. *State v. Carriger*, 132 Ariz. 301, 645 P.2d 816 (1982).

Sentence vacated, remanded for resentencing.

59. *State v. McLoughlin*, 133 Ariz. 458, 652 P.2d 531 (1982).

Conviction reversed, remanded for

(a,b,c) 60. *State v. Gerlaugh*, 134 Ariz. 164, 654 P.2d 800 (1982).

135 Ariz. 89, 659 P.2d 642 (1983).

Conviction and sentence affirmed.

(a) 61. *State v. Woratzeck*, 134 Ariz. 452, 657 P.2d 865 (1982).

Conviction and sentence affirmed.

(a) 62. *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1, *cert. denied*, 461 U.S. 971 (1983).

Resentencing affirmed.

(a,b,d) 63. *State v. Zaragoza*, 135 Ariz. 63, 659 P.2d 22, *cert. denied*, 462 U.S. 1124 (1983).

Conviction and sentence affirmed.

(a,d,e) 64. *State v. Graham*, 135 Ariz. 209, 660 P.2d 460 (1983).

Conviction affirmed, sentence reduced to life.

(a,c,d) 65. *State v. Jeffers*, 135 Ariz. 404, 661 P.2d 1105, *cert. denied*, 464 U.S. 865 (1983).

Conviction and sentence affirmed.

(a,b) 66. *State v. Gillies*, 135 Ariz. 500, 662 P.2d 1007 (1983).

Conviction affirmed, remanded for resentencing.

67. *State v. McMurtrey*, 136 Ariz. 93, 664 P.2d 637, *cert. denied*, 464 U.S. 858 (1983).

Conviction affirmed, remanded for resentencing.

68. *State v. Rumsey*, 136 Ariz. 166, 665 P.2d 48 (1983), *aff'd*, 467 U.S. 203 (1984).

Sentence vacated, sentence reduced to life.

(a,b) 69. *State v. McDaniel*, 136 Ariz. 188, 665 P.2d 70 (1983).

Conviction affirmed, sentence reduced to life.

(a,b) 70. *State v. Adamson*, 136 Ariz. 250, 665 P.2d 972, *cert. denied*, 464 U.S. 865 (1983).

Conviction and sentence affirmed.

71. *State v. Smith (Roger)*, 136 Ariz. 273, 665 P.2d 995 (1983).

Conviction affirmed, remanded for resentencing.

(a,d,e) 72. *State v. Richmond*, 136 Ariz. 312, 666 P.2d 57, *cert. denied*, 464 U.S. 986 (1983).

Resentencing affirmed.

73. *State v. Leslie*, 136 Ariz. 463, 666 P.2d 1072 (1983).

Order granting new trial affirmed, remanded for new trial.

74. *State v. Hensley*, 137 Ariz. 80, 669 P.2d 58 (1983).

Conviction affirmed, remanded for resentencing.

75. *State v. Routhier*, 137 Ariz. 90, 669 P.2d 68 (1983), *cert. denied*, 464 U.S. 1073 (1984).

Conviction reversed, remanded for new trial.

76. *State v. Spoon*, 137 Ariz. 105, 669 P.2d 83 (1983).

Conviction reversed, remanded for new trial.

(a,c,d) 77. *State v. Harding*, 137 Ariz. 278, 670 P.2d 383 (1983), *cert. denied*, 465 U.S. 1013 (1984).

Conviction and sentence affirmed.

78. *State v. Jordan*, 137 Ariz. 504, 672 P.2d 169 (1983).

Sentence vacated, remanded for resentencing.

79. *State v. Cruz*, 137 Ariz. 541, 672 P.2d 470 (1983).

Conviction reversed, remanded for new trial.

(a,b,c) 80. *State v. Lambright*, 138 Ariz. 63, 673 P.2d 1 (1983), *cert. denied*, 469 U.S. 892 (1984).

Conviction and sentence affirmed.

(a,b,e) 81. *State v. Smith (Robert)*, 138 Ariz. 79, 673 P.2d 17 (1983), *cert. denied*, 465 U.S. 1074 (1984).

Conviction and sentence affirmed.

82. *State v. Vickers*, 138 Ariz. 450, 675 P.2d 710 (1983)

Conviction reversed, remanded for new trial.

(a,b,c) 83. *State v. Summerlin*, 138 Ariz. 426, 675 P.2d 686 (1983).

Conviction and sentence affirmed.

84. *State v. Walker*, 138 Ariz. 491, 675 P.2d 1310 (1984).

Conviction reversed, remanded for new trial.

(a,b,c) 85. *State v. McCall*, 139 Ariz. 147, 677 P.2d 920 (1983), *cert. denied*, 467 U.S. 1220 (1984).

Conviction and sentence affirmed.

(a,b) 86. *State v. Libberton*, 141 Ariz. 132, 685 P.2d 1284 (1984).

Conviction and sentence affirmed.

(a,b,c) 87. *State v. James*, 141 Ariz. 141, 685 P.2d 1293, *cert. denied*, 469 U.S. 990 (1984).

Conviction and sentence affirmed.

(a,c) 88. *State v. Fisher*, 141 Ariz. 227, 686 P.2d 750, *cert. denied*, 469 U.S. 1066 (1984).

Conviction and sentence affirmed.

(a,b,c) 89. *State v. Chaney*, 141 Ariz. 295, 686 P.2d 1265 (1984).

Conviction and sentence affirmed.

(a,b) 90. *State v. Harding*, 141 Ariz. 492, 687 P.2d 1247 (1984)

Conviction and sentence affirmed.

(a,d) 91. *State v. Smith (Roger)*, 141 Ariz. 510, 687 P.2d 1265 (1984).

Resentencing affirmed.

92. *State v. Emery*, 141 Ariz. 549, 688 P.2d 175 (1984).

Conviction affirmed, sentence reduced to life.

(a,c,d) 93. *State v. Villafuerte*, 142 Ariz. 323, 690 P.2d 42 (1984), *cert. denied*, 469 U.S. 1230 (1985).

Conviction and sentence affirmed.

94. *State v. Clabourne*, 142 Ariz. 355, 690 P.2d 54 (1984).

Conviction and sentence affirmed.

95. *State v. Tison (Ricky)*, 142 Ariz. 446, 690 P.2d 747 (1984), *vacated*, ___ U.S. ___, 107 S.Ct 1676, 95 L.Ed.2d 127 (1987).

Sentence affirmed.

96. *State v. Tison (Raymond)*, 142 Ariz. 454, 690 P.2d 755 (1984), *vacated*, ___ U.S. ___, 107 S.Ct 1676, 95 L.Ed.2d 127 (1987).

Sentence affirmed.

(a,b,c) 97. *State v. Gillies*, 142 Ariz. 564, 691 P.2d 1059 (1984), *cert. denied*, 470 U.S. 1059 (1985).

Resentencing affirmed.

98. *State v. Hensley*, 142 Ariz. 598, 691 P.2d 689 (1984).

Resentencing affirmed.

99. *State v. Schad*, 142 Ariz. 619, 691 P.2d 710 (1984).

Conviction reversed, remanded for new trial.

100. *State v. McMurtrey*, 143 Ariz. 71, 691 P.2d 1099 (1984).

Resentencing vacated, remanded for resentencing.

(a,b,c) 101. *State v. Carriger*, 143 Ariz. 142, 692 P.2d 991 (1984), *cert. denied*, 471 U.S. 1111 (1985).

Conviction and sentence affirmed.

102. *State v. Nash*, 143 Ariz. 392, 694 P.2d 222, *cert. denied*, 471 U.S. 1143 (1985).

Conviction and sentence affirmed.

(a,d) 103. *State v. Poland (Patrick)*, 144 Ariz. 388, 698 P.2d 183 (1985), *aff'd*, 476 U.S. 147 (1986).

Conviction and sentence affirmed.

104. *State v. Poland (Michael)*, 144 Ariz. 412, 698 P.2d 207 (1985), *aff'd*, 476 U.S. 147 (1986).

Conviction and sentence affirmed.

105. *State v. Gerlaugh*, 144 Ariz. 449, 698 P.2d 694 (1985).

Conviction and sentence affirmed.

106. *State v. Bishop*, 144 Ariz. 521, 698 P.2d 1240 (1985).

Conviction and sentence affirmed.

(a,b,c) 107. *State v. Roscoe*, 145 Ariz. 212, 700 P.2d 1312 (1984), *cert. denied*, 471 U.S. 1094 (1985).

Conviction and sentence affirmed.

(a,c) 108. *State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670, *cert. denied*, 474 U.S. 975 (1985).

Conviction and sentence affirmed.

(a,b,c) 109. *State v. Bracy*, 145 Ariz. 520, 703 P.2d 464 (1985), *cert. denied*, 474 U.S. 1110 (1986).

Conviction and sentence affirmed.

110. *State v. Hooper*, 145 Ariz. 538, 703 P.2d 482 (1985), *cert. denied*, 474 U.S. 1073 (1986).

Conviction and sentence affirmed.

111. *State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670 (1985).

Conviction and sentence affirmed.

(a,b,c) 112. *State v. Rossi*, 146 Ariz. 359, 706 P.2d 371 (1985).

Conviction affirmed, remanded for resentencing.

(a,d,e) 113. *State v. Smith (Bernard)*, 146 Ariz. 491, 707 P.2d 289 (1985).

Conviction and sentence affirmed.

114. *State v. Evans*, 147 Ariz. 57, 708 P.2d 738 (1985).

Sentence affirmed.

115. *State v. Tittle*, 147 Ariz. 339, 710 P.2d 449 (1985).

Conviction reversed, remanded for new trial.

(a,e) 116. *State v. Johnson*, 147 Ariz. 395, 710 P.2d 1050 (1985).

Conviction affirmed, sentence reduced to life.

(a,b,c) 117. *State v. Correll*, 148 Ariz. 468, 715 P.2d 721 (1986).

Three convictions affirmed; two sentences affirmed; one sentence reduced to life.

118. *State v. Mauro*, 149 Ariz. 24, 716 P.2d 393 (1986), *rev'd*, 481 U.S. 520 (1987).

Conviction reversed, remanded for new trial.

(a,b) 119. *State v. Castaneda*, 150 Ariz. 382, 724 P.2d 1 (1986).

Conviction and sentence affirmed.

120. *State v. McMurtrey*, 151 Ariz. 105, 726 P.2d 202 (1986), *cert. denied*, 480 U.S. 911 (1987).

Resentencing affirmed.

(a,c,d) 121. *State v. Wallace*, 151 Ariz. 362, 728 P.2d 232 (1986), *cert. denied*, 483 U.S. 1011 (1987).

Three convictions affirmed; two sentences affirmed; one sentence remanded for resentencing.

122. *State v. Fisher*, 152 Ariz. 116, 730 P.2d 825 (1986).

Denial of petition for post-conviction relief affirmed in part and reversed and remanded in part.

123. *State v. LaGrand (Karl)*, 152 Ariz. 483, 733 P.2d 1066, *cert. denied*, ___ U.S. ___, 108 S.Ct. 206, 98 L.Ed.2d 157 (1987).

Conviction and sentence affirmed.

(a,b,c) 124. *State v. LaGrand (Walter)*, 153 Ariz. 21, 734 P.2d 563, *cert. denied*, ___ U.S. ___, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987).

Conviction and sentence affirmed.

125. *State v. Rossi*, 154 Ariz. 245, 741 P.2d 1223 (1987).

Conviction affirmed, remanded for resentencing.

(a,b) 126. *State v. Moorman*, 154 Ariz. 578, 744 P.2d 679 (1987).

Conviction and sentence affirmed.

127. *State v. Smith (Sylvester)*, 155 Ariz. 560, 748 P.2d 1184 (1987).

Sentence vacated, remanded for resentencing.

128. *State v. Charo*, 156 Ariz. 561, 754 P.2d 288 (1988).

Conviction reversed, remanded for new trial.

129. *State v. Arnett*, 158 Ariz. 15, 760 P.2d 1064 (1988).

Conviction and sentence affirmed.

(a,b,c) 130. *State v. Beaty*, 158 Ariz. 232, 762 P.2d 519 (1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3200, 105 L.Ed.2d 708 (1989).

Conviction and sentence affirmed.

131. *State v. Stevens*, 158 Ariz. 595, 764 P.2d 724 (1988).

Conviction affirmed, sentence reduced to life.

132. *State v. Mauro*, 159 Ariz. 186, 766 P.2d 59 (1988).

Conviction affirmed, sentence reduced to life.

(a,b,c) 133. *State v. Vickers*, 159 Ariz. 532, 768 P.2d 1177 (1989)

Conviction and sentence affirmed.

(a,b,c) 134. *State v. Walton*, 159 Ariz. 571, 769 P.2d 1017 (1989), *cert. granted*, ___ U.S. ___, 110 S.Ct. 49, 107 L.Ed.2d 18 (1989).

Conviction and sentence affirmed.

135. *State v. McCall*, 160 Ariz. 119, 770 P.2d 1165 (1989).

Conviction and sentence affirmed.

136. *State v. Prince*, 160 Ariz. 268, 772 P.2d 1121 (1989).

Conviction affirmed, sentence reduced to life.

137. *State v. Wallace*, 160 Ariz. 424, 773 P.2d 983 (1989).

Resentencing affirmed.

138. *State v. Tison (Ricky & Raymond)*, 160 Ariz. 501, 774 P.2d 805 (1989).

Sentence vacated, remanded for resentencing.

139. *State v. Rockwell*, 161 Ariz. 5, 775 P.2d 1069 (1989).

Conviction affirmed, sentence reduced to life.

(a,b,c) 140. *State v. Fulminante*, 161 Ariz. 237, 778 P.2d 602 (1989).

Conviction reversed, remanded for new trial.

141. *State v. Romanosky*, ___ Ariz. ___, 782 P.2d 693 (1989).

Conviction reversed, remanded for new trial.

(a,c) 142. *State v. Marlow*, 47 Ariz. Adv. Rep. 37 (Nov. 9, 1989).

Conviction affirmed, sentence reduced to life.

143. *State v. Schad*, 49 Ariz. Adv. Rep. 23 (Dec. 14, 1989).

Conviction and sentence affirmed.

144. *State v. Williams*, No. 6275 (Oct. 8, 1987).

Conviction and sentence affirmed.

145. *State v. Connor*, CR-84-0264-AP/PC (Jan. 9, 1990).

Conviction affirmed, sentence reduced to life.

146. *State v. Lopez*, No. CR-87-0184-AP (Jan. 16, 1990).

Conviction affirmed, remanded for resentencing.

147. *State v. Serna*, No. CR-87-0183-AP (Jan. 23, 1990).

Conviction and sentence affirmed.

TOTALS

	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	T
Conv. & sent. aff'd.		2	4	2	2	9	9	3	10	15	11	6	4	2	5	1	85
Conv. rev'd, rem'd for new trial.		1	1	2		4		3	5	2	1	2		1	2		24
Conv. aff'd, sent. reduced to life.	1	1	1		2	1	1	1	3	1	1	1		2	3	1	20
Conv. aff'd, rem'd for resentencing.		2		3	5	1	1	1	5	1	1	1	2		2	1	26
Totals	1	6	6	7	9	15	11	8	23	19	14	10	6	5	12	3	155

2309D

Supreme Court, U.S.
FILED
NOV. 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-189

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JAMES R. RICKETTS, Director,
Arizona Department of Corrections, et. al.,

Petitioners,

vs.

JIMMIE WAYNE JEFFERS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER*
CHARLES L. HOBSON
Criminal Justice Legal Fdn.
2131 L Street
Post Office Box 1199
Sacramento, California 95812
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

*Attorney of Record

BEST AVAILABLE COPY

Question Presented

May a federal court set aside a state court's finding of an aggravating circumstance in a capital case without applying a standard that requires some deference to the state court's finding?

TABLE OF CONTENTS

Table of Authorities Cited iii

Interest of Amicus 1

Summary of Facts and Case 2

Summary of Argument 3

Argument 4

I

The aggravating circumstance question has four components: definition, adequacy, application and correctness 4

A. Definition and adequacy (*Cartwright*) 5

B. Application and correctness (*Godfrey*) 6

II

The Court of Appeals applied the wrong standard of review . 8

A. Definition 8

B. Adequacy 9

C. Application 10

D. Correctness 11

Conclusion 13

TABLE OF AUTHORITIES CITED

Cases

Blake v. State, 239 Ga. 292, 236 S.E.2d 637 (1977) 7

Brown v. Allen, 344 U.S. 443, 97 L.Ed. 469, 73 S.Ct. 397 (1953) 10

Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987) . . . 5, 6

Chaney v. Lewis, 801 F.2d 1191 (9th Cir. 1986) 4, 6

Darr v. Burford, 339 U.S. 200, 94 L.Ed. 761, 70 S.Ct. 587 (1950) 10

Ex parte Hawk, 321 U.S. 114, 88 L.Ed. 572, 64 S.Ct. 528 (1944) 10

Frank v. Mangum, 237 U.S. 309, 59 L.Ed. 969, 35 S.Ct. 582 (1915) 10

Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972) 6, 9

Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980) 6, 7, 11

Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976) 7, 9

Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976) 7

Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979) 11

Jeffers v. Ricketts, 627 F. Supp. 1334 (D. Ariz. 1986) 3

Jeffers v. Ricketts, 832 F.2d 476 (9th Cir. 1987) 12

Jurek v. Texas, 428 U.S. 262, 49 L.Ed.2d 929, 96 S.Ct. 2950 (1976) 9

Marshall v. Lonberger, 459 U.S. 422, 74 L.Ed.2d 646, 103 S.Ct. 843 (1983) 10

Maynard v. Cartwright, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) 5

Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975) 9

Patton v. Yount, 467 U.S. 1025, 81 L.Ed.2d 847, 104 S.Ct. 2862 (1984) 8, 10

State v. Gretzler, 135 Ariz. 42, 659 P.2d 1 (1983) 4, 9

State v. Jeffers, 235 Ariz. 404, 661 P.2d 1105 (1983) . 2, 3, 11, 12

Sumner v. Mata, 455 U.S. 591, 71 L.Ed.2d 508, 102 S.Ct. 1322 (1982) 10

Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977) 8

Statutes

28 U.S.C. § 2254(d) 4, 10

Ariz. Rev. Stat. § 13-703(F)(6) 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JAMES R. RICKETTS, Director,
Arizona Department of Corrections, et. al.,

Petitioners,

vs.

JIMMIE WAYNE JEFFERS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION

INTEREST OF AMICUS

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest.

CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of

---

1. CJLF has received written consent of the parties to file this brief.

society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The present case involves the relitigation of a question fully and fairly litigated in the state courts with proper respect for this Court's precedents and for the constitutional rights of the respondent. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

While in jail in 1976, Jimmie Wayne Jeffers attempted to solicit another jail inmate to kill Penelope Cheney. His apparent motive was retaliation for Ms. Cheney's cooperation with the police regarding Jeffers' heroin dealings. After his release from jail, Jeffers killed Ms. Cheney himself. He injected her with a drug overdose, choked her with a belt and his hands, and forced another person to inject more drugs. He then beat her while calling her a "bitch" and a "dirty snitch." While delivering blows, he said "This one's for [naming various names]." He left the body in the shower stall of his motel room for three days. Then he buried it in a shallow grave in a remote area. Wild animals soon unearthed and devoured the body. *State* v. *Jeffers*, 135 Ariz. 404, 661 P.2d 1105, 1113-1114, 1130-1131 (1983).

Jeffers was convicted by the jury and sentenced to death by the court. After the Arizona Supreme Court ordered resentencing, he was sentenced to death again. The trial court found as aggravating circumstances that Jeffers had caused a great risk of death to a second person and that the killing was especially heinous, cruel and depraved.

On appeal, the Arizona Supreme Court gave careful consideration to Jeffers' attack on the aggravating circumstances. The court reversed the great risk of death circumstance and the finding that the killing was especially cruel. *State* v. *Jeffers*, 235 Ariz. 404, 661 P.2d 1105, 1130 (1983). However, after discussion of numerous other Arizona cases defining and limiting the terms "heinous" and "depraved," the court upheld the finding that the killing was especially heinous and depraved. *Id.* at 1130-1131.

Jeffers filed a petition for habeas corpus in the federal district court. After a thorough discussion of Jeffers' contentions, the district court decided that his claims were meritless. *Jeffers* v. *Ricketts*, 627 F. Supp. 1334 (D. Ariz. 1986). A divided panel of the Ninth Circuit reversed. Although reaffirming that this aggravating circumstance is constitutional, Cert. Pet. A23-A26, the majority conducted its own comparison of this case with other Arizona cases and decided that "[b]ecause the standard of heinousness and depravity delineated in prior Arizona cases cannot be applied in a principled manner to Jeffers, his death sentence must be struck down as arbitrary." *Id.* at A40.

SUMMARY OF ARGUMENT

This case presents the question of what degree of deference a federal habeas corpus court must pay to a decision of the state court that an aggravating circumstance exists in a capital case. That question is a complex one because aggravating circumstances have a complex character. They are determinations of fact on an issue of state law which has been created in response to a federal requirement. Not surprisingly, there has been considerable confusion.

Amicus submits that the question breaks down into four separate issues. First, what is the definition of the aggravating circumstance? Second, does that circumstance, as defined, perform the function required by federal law? Third, did the factfinder actually apply that definition to the present case? Fourth, do the facts of the case actually fit the definition?

These four questions are questions of state law, federal law, procedural fact and ultimate fact, respectively. Based on the habeas corpus statutes and this Court's decisions to date, the respective degrees of deference are: state law — absolute; federal law — none; procedural fact — 28 U.S.C. § 2254(d); ultimate fact — evidence sufficient for any rational factfinder.

ARGUMENT

I. The aggravating circumstance question has four components: definition, adequacy, application and correctness.

The Court of Appeals saw the aggravating circumstance question as one of whether the statute was "unconstitutionally vague on its face and as applied." Cert. Pet. A24. This is a two-step approach looking first at the bare words of the statute and second at this case as compared with others. For the first step, the court referred to its prior decision in *Chaney* v. *Lewis*, 801 F.2d 1191, 1194-1196 (9th Cir. 1986). The remainder of the opinion is the "as applied" step.

A better description of the questions presented by this kind of statute was given by the Arizona Supreme Court in *State* v. *Gretzler*, 135 Ariz. 42, 659 P.2d 1, 9 (1983):

> "The application of such a provision may be constitutionally infirm for either of two reasons. First, a state's highest tribunal may fail to adopt a construction of its statute sufficiently narrow to make sentencing discretion 'suitably directed and limited.' *Gregg v. Georgia*, supra, 428 U.S. at 189, 96 S.Ct. at 2932, 49 L.Ed.2d at 883 (1976) (judgment of the Court and opinion of Stewart, Powell, and Stevens, J.J.) (upholding Georgia's death penalty statute). Secondly, the state tribunal may stray in an individual case from an otherwise constitutionally narrow construction. *See Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (reversing one individual application of Georgia's death penalty statute)."

The two questions identified by the Arizona Supreme Court, the *Cartwright* question and the *Godfrey* question, have two components each, giving a total of four issues.

A. Definition and Adequacy (Cartwright).

The correct mode of analysis on the first question is the inquiry set forth in *Maynard* v. *Cartwright*, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). The "on its face" versus "as applied" analysis undertaken by the Court of Appeals in this case is similar to the approach rejected by this Court in *Cartwright*.

Cartwright involved a crime which most people would agree was especially heinous, cruel *and* depraved. See 108 S.Ct. at 1856, 100 L.Ed.2d at 378. Even so, the Tenth Circuit reviewed the body of Oklahoma case law and determined that the Oklahoma Court of Criminal Appeals had abandoned its prior, narrowed construction for a diffuse, undefined one. *Cartwright* v. *Maynard*, 822 F.2d 1477, 1487 (10th Cir. 1987).

The court specifically noted that this was not a case like *Godfrey*, which was a case of "an aberrational lapse" in the application of a valid standard. *Id*. at 1491. Instead, "there is no constitutionally adequate narrowing construction adopted by the state courts that we can apply to this case." *Id*. at 1492.

On certiorari, the State argued that even if the standard were vague, Cartwright's case clearly fell "within reach of the language at issue" and the sentence could therefore be upheld. *Maynard* v. *Cartwright*, *supra*, 108 S.Ct. at 1857, 100 L.Ed.2d at 380. "The difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment." *Id*. at 1857-1858. The correct analysis of the constitutionality of the state standard is to examine the entire body of case law to determine if the statute has received a sufficiently narrowing construction that the sentencer is not left "with the kind of open-ended discretion which was held invalid in *Furman* v. *Georgia*, 408 U.S. 238 (1972)." *Id*. at 1858. This involves two questions. First, how is the circumstance defined under state law? Second, does that circumstance adequately provide a meaningful basis to select death-eligible cases? We will return to these questions in part II, below.

B. Application and Correctness (Godfrey).

Cartwright relies heavily on *Godfrey* v. *Georgia*, 446 U.S. 420 (1980) for the underlying requirement of a principled way to distinguish death-eligible cases from non-death-eligible cases. *Cartwright*, 108 S.Ct. at 1858-1859, 100 L.Ed.2d at 381-382. Nevertheless, the two cases involve different questions.

In *Godfrey*, unlike *Cartwright*, the Georgia Supreme Court had duly narrowed the definition of the circumstance in its other cases, 446 U.S. at 430-432, but neither the jury nor the state court had ever applied that restricted definition to Godfrey's case. *Id*. at 432. The trial judge simply instructed the jury in the literal words of the statute. *Id*. at 426. The state supreme court did no further narrowing in its review. See *id*. at 427.

The essence of the *Godfrey* problem, then, is that there were two *different* definitions of the circumstance in Georgia. First, there was the definition in the bare words of the statute. The plurality in *Gregg* v. *Georgia*, 428 U.S. 153, 201 (1976) had already implied that this definition was too broad to adequately distinguish death-eligible cases from others. Second, there was the narrowed, constitutionally valid definition established in *Harris* v. *State*, 237 Ga. 718, 230 S.E.2d 1 (1976) and *Blake* v. *State*, 239 Ga. 292, 236 S.E.2d 637 (1977). See *Godfrey*, *supra*, 446 U.S. at 430-432. The question was, which of these two definitions had the factfinder applied?

The *Godfrey* plurality did undertake an examination of "the facts and circumstances of the murders that he was convicted of committing." 446 U.S. at 432. The purpose of that examination, though, was not to second-guess the factfinder. The examination was necessary because the ambiguity of the state court opinion left open the question "whether . . . the Georgia Supreme Court can be said to have *applied* a constitutional construction . . . ." *Ibid*. (italics added). *Godfrey* does *not* open up to relitigation *de novo* the question of whether a construction which was clearly applied had been applied correctly.

The dissenters feared that the plurality had done exactly that. 446 U.S. at 443 (Burger, C. J.); *id.* at 451 (White, J.). "[O]ur role is not to peer majestically over the lower

court's shoulder so that we might second-guess its interpretation of facts that quite reasonably — perhaps even quite plainly — fit within the statutory language." *Id.* at 450. If such a role is undesirable in this Court on direct review, it is far worse to allow such second-guessing by the lower federal courts on habeas corpus. Cf. *Patton* v. *Yount*, 467 U.S. 1025, 1038 (1984). That kind of review would reduce the state trial to nothing more than a preliminary hearing for the habeas proceeding. Cf. *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977).

To avoid the ill-effects which the *Godfrey* dissenters warned against, it is necessary to separate the legal and procedural question of what standard the factfinder applied from the ultimate question of whether the factfinder arrived at the "correct" answer.

We thus have four questions: (1) What is the definition of the circumstance? (2) Does that circumstance fulfill the requirement of a meaningful separation of death-eligible from non-death-eligible cases? (3) Did any state court or jury, at any stage in the process, apply that definition to the facts of the present case? (4) Did the factfinder in applying that definition "get the right answer"? The standard of review is different for each question.

II. The Court of Appeals applied the wrong standard of review.

A. Definition.

The definition of the aggravating circumstance is initially for the state legislature. In this case, the Arizona Legislature has defined the circumstance only in the vague words "in an especially heinous, cruel or depraved

manner." Ariz. Rev. Stat. § 13-703(F)(6). The interpretation of this language is the responsibility of the Arizona Supreme Court. That court has extensively discussed this language in *State* v. *Gretzler*, 135 Ariz. 42, 659 P.2d 1, 9-12 (1983) and in the other cases discussed by the court below, by the dissenting judge, and by the parties. Cert. Pet. 16-23, A27-A39, A66-A70; Resp. Opp. 5-8.

As this Court has said many times, the state supreme court's construction of the state statute is not reviewable by a federal court. See, e.g., *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975).[2] An otherwise unconstitutional death penalty statute can be saved by construction, see *Gregg* v. *Georgia*, 428 U.S. 153, 201 (1976) (narrowing construction), even if that construction appears to defy the plain wording of the statute. See *Jurek* v. *Texas*, 428 U.S. 262, 272 (1976) (construction of future dangerousness special issue as permitting consideration of all mitigating evidence).

The standard of review on definition of the circumstance is therefore the simplest. There is no review. The aggravating circumstance is what the state supreme court says it is.

B. Adequacy.

The adequacy of the aggravating circumstance to perform the narrowing function required by *Furman* v. *Georgia*, 408 U.S. 238 (1972) and its progeny is a question of federal law. Since 1953, federal habeas courts

---

2. *Mullaney* indicated a possible exception for constructions which were an obvious subterfuge to raise a state procedural bar to review of a federal question. *Id.* at 691 n. 11. This exception is inapplicable to the kind of substantive law question presented here.

have reviewed such questions *de novo*, following the outline in Justice Frankfurter's concurring opinion in *Brown* v. *Allen*, 344 U.S. 443, 507-508 (1953).[3]

Analysis of the merits of the *Cartwright* question is not within the question presented for certiorari in this case, but it is squarely presented in *Walton* v. *Arizona*, 88-7351, *cert. granted* 58 U.S.L.W. 3181 (Oct. 2, 1989). We therefore defer the briefing of this issue to that case. Assuming the aggravating circumstance as defined by the whole body of Arizona case law to be constitutionally adequate, we proceed to the next question.

C. Application.

Absent a clear record, such as jury instructions, there may be a factual dispute as to whether the factfinder applied the constitutional, narrowed definition or the unconstitutionally broad definition. This is the kind of historical fact underlying a federal legal question for which Congress has mandated deference to the state courts. 28 U.S.C. § 2254(d). Similar underlying facts requiring such deference include the actual advisements given a defendant at a prior proceeding with an ambiguous record, *Marshall* v. *Lonberger*, 459 U.S. 422, 431-432 (1983); whether a potential juror is actually biased, *Patton* v. *Yount*, 467 U.S. 1025, 1036-1038 (1984); and whether witnesses were under pressure from authorities, *Sumner* v. *Mata*, 455 U.S. 591, 597 (1982).

---

3. Prior to that time, this Court had stated repeatedly that federal courts had the discretion to defer to the prior state-court adjudication. *Ex parte Hawk*, 321 U.S. 114, 118 (1944); *Darr* v. *Burford*, 339 U.S. 200, 215 (1950); *Frank* v. *Mangum*, 237 U.S. 309, 334 (1915).

In the present case, we have the Arizona Supreme Court's extended discussion of the definition in the course of its independent determination of the truth of the circumstance. *State* v. *Jeffers*, 661 P.2d 1105, 1130-1131 (1983). The court had previously decided that gratuitous violence beyond that needed to kill constitutes special heinousness and depravity of mind. This is true even when the violence does not constitute cruelty because the victim is unconscious or dead. *Id.* at 1131. The court had also previously decided that apparent relish of the killing constitutes an especially heinous and depraved state of mind. *Ibid.* The court found both the gratuitous violence and apparent relish facts true and from them found the heinous and depraved circumstances true. *Ibid.* The Arizona court's analysis is in sharp contrast with the scanty comments of the state court in *Godfrey* v. *Georgia*, 446 U.S. 420, 427 (1980). The Arizona court clearly applied the narrowed standard established in its decisions and not the impermissibly broad definition of the bare words of the statute. The *Godfrey* problem is not presented here.

D. Correctness.

The final question is whether, even though the factfinder applied the correct, constitutional definition of the circumstance, the factfinder nonetheless arrived at the wrong answer. Such a claim, by itself, fails to present a federal question. Only if there is so little evidence in the record that *no* rational factfinder could have been convinced to the requisite degree of confidence can a federal habeas claim be made. *Jackson* v. *Virginia*, 443 U.S. 307, 313 (1979).

It is here that the Court of Appeals makes its worst mistake, adopting the interpretation of *Godfrey* advanced in the dissent, rather than what the plurality opinion

actually says.[4] "Illuminated as the above standard is by the case examples furnished by the Arizona Supreme Court, it seems to call for conduct or attitudes more shocking than those exhibited by Jeffers." *Jeffers* v. *Ricketts*, 832 F.2d 476, 484 (9th Cir. 1987). The Court of Appeals then proceeded to make its own determination of "shockingness," usurping the core function of the finder of fact.

The State of Arizona has chosen to authorize its Supreme Court to review the factfinding independently. *State* v. *Jeffers*, *supra*, 661 P.2d at 1130. That decision does not authorize federal habeas court to do the same. If the definition of the circumstance is constitutional and if the factfinder actually employed that definition, then the factfinder's determination can only be questioned under *Jackson*. The factual finding stands if *any* rational factfinder could have found this murder especially "heinous" or "depraved" as those terms have been defined by the Arizona Supreme Court in this and other cases.

The Court of Appeals' opinion that Jeffers showed less relish for the crime than certain other defendants, Cert. Pet. A34-A37, and that this case involves less gratuitous violence than some others, *id.* A37-A39, is simply a disagreement in the application of the definition to the facts of this case. This is no different than second-guessing a jury's determination of whether a killer acted with "malice" or whether conduct was reckless rather than negligent. These subjective determinations are entrusted to the factfinder. They may be reviewed on federal habeas corpus only under *Jackson*. This case

---

4. See pp. 7-8, *supra*. If every decision were interpreted to mean what its own dissent says it means, the legal landscape would be bizarre indeed.

easily clears the *Jackson* hurdle. A rational factfinder could easily find that Jeffers both relished the crime and inflicted gratuitous violence.

Conclusion

The decision of the Court of Appeals should be reversed and the judgment of the district court denying the petition reinstated.

Dated: November, 1989

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation